A JUDICIARY DIMINISHED IS JUSTICE DENIED: THE CONSTITUTION, THE SENATE, AND THE VACANCY CRISIS IN THE FEDERAL JUDICIARY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

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A JUDICIARY DIMINISHED IS JUSTICE DENIED: THE CONSTITUTION, THE SENATE, AND THE VACANCY CRISIS IN THE FEDERAL JUDICIARY

THURSDAY, OCTOBER 10, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:10 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. Committee will come to order. I am Steve Chabot, Chairman of the Subcommittee on the Constitution of the Judiciary Committee. We welcome everyone here this morning.

This morning the Subcommittee on the Constitution convenes to explore the causes and effects of the current Federal judiciary vacancy crisis and the Senate's constitutional role in confirming Federal judges. During the first 2 years of the current Administration, the United States circuit courts of appeals have suffered under the highest vacancy rates in at least a decade. During 2001 and 2002, the vacancy rates in the circuit courts have been 17.9 percent and 15.6 percent respectively. Currently only 9 out of the 16 seats on the Sixth Circuit Court of Appeals, which happens to be the circuit that my community, Cincinnati, OH, is located within, have been filled, and the large vacancy rate on the Sixth Circuit has prompted the U.S. Administrative Office of Courts to declare a "judicial emergency" in that circuit.

Jeffrey Sutton and Deborah Cook have been nominated for seats on the sixth circuit for over a year, yet the Senate Judiciary Committee has failed to even schedule a hearing on their nominations, a situation that *The Cincinnati Post*, one of the hometown newspapers in my community, has editorialized as, "an outrage."

The vacancy crisis in the sixth circuit has resulted in serious allegations by a dissenting judge that the chief judge improperly influenced the outcome of a case by using nonrandom procedures to appoint himself to the panel in *Grutter* v. *Bollinger*, a case involving the use of race in admission to the University of Michigan law school. Following those allegations and an inquiry from this Committee, Chief Judge Martin has now been forced to institute more random assignment procedures and conduct an extensive review of the court's internal operating procedures. In response to this Committee's inquiry regarding the procedures in *Grutter*, Chief Judge

Martin wrote, "Operating within a circuit as ours, with 8 vacancies out of 16 positions, we, of course, have found great difficulty in completing enough panels." That difficulty, however, cannot justify resorting to nonrandom assignments that threaten public confidence and the impartiality of the judiciary.

The current Senate's record on scheduling, holding hearings, and confirming judges is significantly worse than previous Senate's when measured by the only valid criteria on which to compare, namely confirmation rates, not raw numbers of confirmations. According to *The Washington Post*'s August 9 editorial, "The elder President Bush, in a period of divided Government similar to this, one saw 70 of his 74 nominations [95 percent] confirmed. And President Clinton got 126 of his 140 nominees acted upon [90 percent] a reminder that the Senate is capable of far swifter action than recent practice has permitted. By contrast, President Bush has seen only 59 percent of his 123 nominees confirmed. More disturbing, the pernicious practice of letting nominees hang indefinitely is not improving. Eleven of Mr. Bush's circuit court nominees have waited more than a year for a hearing; none of the past three Presidents saw any circuit court nominee suffer this indignity during his first 2 years in office."

The Senate Judiciary Committee remains a partisan bottleneck that has kept many nominees from being reported to the full Senate for an up-or-down vote. While Senator Daschle has referred to a "200-year-old precedent" when describing the tradition of not scheduling votes by the full Senate out of deference to the Senate Judiciary Committee's failure to report names, no such 200-year-old tradition exists. And even if it did, it would appear to violate constitutional principles and the Founders' understanding of the Constitution as articulated in the Federalist Papers.

Article II, section 2 of the Constitution provides that the President, "shall nominate and by and with the Advice and Consent of the Senate shall appoint judges of the Supreme Court and all other officers of the United States."

If there were any room for doubt regarding the role of the full Senate in confirming the President's judicial nominees, Alexander Hamilton in Federalist Paper No. 76 makes clear that the President is, "bound to submit the propriety of his choice to the discussion and determination of a different and independent body and that body an entire branch of the Legislature," with the emphasis on the entire branch of the Legislature. Hamilton's statement clearly presumes that while the Senate has constitutional authority to establish its own rules, it cannot do so in a way that denies the full Senate, an entire branch of the Legislature, the opportunity to discuss and determine the confirmation of each of the President's nominees.

The Senate's failure to bring Presidential nominees before the full body of the Senate for a vote is of great concern to this Subcommittee because of the implications for the administration of justice in the Federal courts and the preservation of the constitutional order envisioned by the Founders. Accordingly in this hearing, we hope to explore the causes and effects of the current Federal judiciary crisis and the Senate's constitutional role in confirming Federal judges.

I look forward to hearing from our witnesses here this morning, and I will now defer to the Minority side should Mr. Scott wish to make an opening statement.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that a statement from the Ranking Member Mr. Nadler be inserted into the record.

Mr. CHABOT. Without objection.

Mr. SCOTT. And meanwhile I look forward to the testimony of the witnesses, particularly you mentioned your circuit, Mr. Chairman, the hearings that have been held in the circuit represented by my colleague in Virginia and myself, and the numerous hearings that have been held for circuit court vacancies in that circuit over the last 10 years.

Mr. CHABOT. Thank you very much. I appreciate the comments.

Mr. Forbes, is there anything you would like to say?

Mr. FORBES. No.

Mr. CHABOT. At this time I will introduce the witness panel, and we have a very distinguished panel here this morning, so we do appreciate you coming.

Our first witness today will be Dr. John C. Eastman, an associate professor at Chapman University School of Law specializing in constitutional law, legal history, civil procedure and property. Mr. Eastman is also the director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute.

Prior to joining the Chapman faculty in 1999, Dr. Eastman served as a law clerk to Supreme Court Justice Clarence Thomas and Judge Michael Luttig of the fourth circuit. He practiced law with Kirkland & Ellis, representing major corporate clients in complex commercial, contract, and consumer litigation. Dr. Eastman has also represented numerous clients in important constitutional law matters and participated in amicus curiae before the Supreme Court of the United States and lower courts.

He has appeared as an expert legal commentator on C-SPAN, FOX News and the O'Reilly factor, and has published numerous op eds in newspapers across the country.

Dr. Eastman holds a Ph.D. in government from the Claremont graduate school and a J.D. from the University of Chicago law school, and we welcome you here this morning.

Our second witness today will be Todd Gaziano, senior fellow in legal studies and director of the Center for Legal and Judicial Studies at the Heritage Foundation, where he focuses on legal and judicial reform.

Before joining the Heritage Foundation in 1997, Mr. Gaziano served as chief counsel to the House Committee on National Economic Growth, National Resources and Regulatory Affairs, where he worked on Governmentwide regulatory reform legislation for Chairman David McIntosh. Prior to that he served in the Office of Legal Counsel in the U.S. Justice Department, which provides advice on constitutional and legal issues to the President, the Attorney General and other Cabinet Secretaries. He also served as a judicial law clerk to the honorable Edith H. Jones, United States judge for the Fifth Circuit Court of Appeals.

Mr. Gaziano received his J.D. from the University of Chicago law school, where he was selected as a John M. Olin Fellow in law and economics. And we welcome you here this morning.

Our third witness will be Ralph Neas, president of People for the America Way and People for the American Way Foundation. Mr. Neas previously served as president of the Neas Group and executive director of the Leadership Conference on Civil Rights, LCCR. In 1987, he led the effort by LCCR and its members, including People for the American Way, to block the nomination of Robert Bork to the U.S. Supreme Court. Prior to that Mr. Neas worked as chief legislative assistant to U.S. Senators Edward W. Brooke and Dave Durenberger.

Mr. Neas has appeared on the news shows of ABC, NBC, CBS, CNN and FOX and has been profiled in numerous print publications including *The New York Times*, *Washington Post* and *The Wall Street Journal*. He holds a J.D. also from the University of Chicago law school, and we welcome you here this morning.

Our final witness today will be Kay Daly, communications director and spokesperson for the Coalition for a Fair Judiciary. The coalition is comprised of more than 70 grassroots organizations dedicated to supporting qualified, capable Federal judicial nominees who are committed to fair and accurate interpretation of existing law. The coalition focuses on all Federal judicial nominees, including nominees to the Court of Appeals, U.S. District Courts and the Supreme Court.

Ms. Daly is nationally recognized as a communication strategist, speechwriter and media coach. She has worked for U.S. Senators Phil Gramm and Pete Wilson, U.S. Representative Fred Heineman and the North Carolina Republican Party in a variety of communications and policy positions. Ms. Daly also worked for the Texas Public Policy Foundation as chief of staff to former Reagan Justice Department official Tex Lazar, and as research director for Tom Joyner, one of North Carolina's top-rated talk show hosts.

Ms. Daly has completed graduate work in legislative affairs at George Washington University, and we welcome you here this morning.

As I said, we have a very distinguished panel, and we are looking forward to your testimony. We would ask if possible if you could confine your statements to approximately 5 minutes. We actually have a lighting system. When the yellow light comes on, that means you have 1 minute to wrap up. When the red light comes on, if you could wrap up your testimony, we would appreciate it, and then we will follow up with questions. And we will start with Dr. Eastman.

STATEMENT OF JOHN EASTMAN, PROFESSOR OF CONSTITUTIONAL LAW, CHAPMAN UNIVERSITY SCHOOL OF LAW, AND DIRECTOR, THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE

Mr. EASTMAN. I want to acknowledge first what an extraordinary hearing this is, a Subcommittee of the House of Representatives inquiring into a matter that is textually committed by the Constitution to the other body, the Senate of the United States. But, of course, the House of Representatives does have an important role

in the overall appointments process. It can propose legislation to confer the power of appointment for lower court judges in the President alone under article II of the Constitution. Moreover, the judicial seats that have been vacant for this entire session of Congress have been not only authorized, but mandated by law, yet that law is clearly not being followed. It is as if Senator Leahy thinks he has been vested with line item veto power and has used his own red pen to singlehandedly strike out 15 percent of the Federal appellate court bench.

But this hearing is about much more than the vacancy created by the Senate's inaction. The unprecedented assertion of power by the Senate is threatening two of the most core principles of our constitutional system of Government. It is intruding upon the President's power to nominate judges, in violation of the separation of powers. And it is threatening the independence of the judiciary and, as a result, the very rule of law itself.

Now, my fellow panelist Ralph Neas is going to tell you that the Senate is just being diligent in its advice and consent role, but quite frankly, his view of that role is fundamentally mistaken. He claims in his prepared testimony that the Senate has a coequal role in nominating judges. That claim is simply not consistent with either the Constitution's text or the history of the advice and consent power.

As I describe in greater detail in my prepared testimony, the Framers of the Constitution assigned to the President the sole power to nominate and the primary power in appointing judges. They did this because they wanted the accountability that came with placing the appointment power in a single individual. And they specifically refused to give the power of appointment to the Senate because they knew the tendency of public bodies to feel no personal responsibility and to give full play to intrigue and cabal.

Now, as with every aspect of the separation of powers, there are, of course, checks on that Presidential power, the requirement of advice and consent to the Senate for principal officers and is a default for inferior officers. But when we view this check, mere check in the Senate as a coequal share in the power of appointment itself, as Mr. Neas does, we grant to the Senate a power that does not—that the Constitution does not confer, opening the door to the very threat of cabal and partisanship that the Founders feared. What is worse, the ideological litmus test some Senators would impose with their new-found power is one that would turn a blind eye to the limits on power that the Constitution itself imposes on those very same Senators.

This threat to an independent judiciary and its ability to check a Congress bent on exercising power that is not authorized by the Constitution is every bit as great as the threat raised by the Court-packing scheme advanced by President Roosevelt in the 1930's and every bit as dangerous to the very idea of limited constitutional Government.

So what can this Committee do? As I alluded to at the beginning, it can consider legislation that would give sole appointment power to the President alone whenever the Senate has failed to act within a reasonable time in confirming or rejecting his nominees. That

would ensure that the Senate's check on Presidential power does not itself become a blank check.

I thank this Committee for the opportunity to help shed some light on this serious problem, and I hope that your hearing today will demonstrate to the country how critical is the constitutional crisis that has been perpetrated by the Senate's abject refusal to perform its advice and consent role for a significant number of the President's nominees to the Circuit Courts of Appeals.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much, Mr. Eastman.

[The prepared statement of Mr. Eastman follows:]

PREPARED STATEMENT OF DR. JOHN C. EASTMAN

Good morning, Chairman Sensenbrenner and other members of the House Judiciary Subcommittee on the Constitution. I am delighted to be here this morning to offer some historical and constitutional perspective on the current stalemate in the Senate Judiciary Committee over confirmations of circuit court judges, its impact on the federal judiciary and, perhaps more importantly, its threat to the separation of powers.

As of yesterday, seventeen months have passed since President Bush nominated his first group of circuit court judges, only three have been confirmed. Several have not even received a hearing, yet the number of vacancies on the federal bench has grown to crisis proportion. Chief Justice William Rehnquist recently complained of an "alarming number of judicial vacancies," creating a real strain on the courts.[1] Even Senator Patrick Leahy, who, as Chairman of the Senate's judiciary committee is largely responsible for the current logjam, previously referred to a judicial vacancy "crisis" when the number of vacancies on the bench was about half what it is today, contending that those who delay or prevent the filling of vacancies were "derelict[in their] duty," and delaying or preventing the administration of justice.[2]

More fundamentally, the judicial vacancy crisis is threatening to hamper the ability of the courts to perform their primary role as an important check on the elected branches of government, protecting individual rights against tyrannical majorities, and insuring that the legislative and executive branches do not exceed the scope of authority delegated to them by the Constitution. As James Madison noted two years before the Constitutional Convention, the "Judiciary Department merits every care" because it "maintains private Right against all the corruptions of the two other departments. . . ."[3]

Of course, Senator Leahy and his Democrat colleagues in the Senate claim that they are simply fulfilling their own constitutional obligation to give "advice and consent" to the President in the nomination process and to insure that those nominees who are "hostile" to their view of what the law ought to be are not confirmed to lifelong seats on the bench. The resulting standoff reveals important differences of opinion over the role of the Senate in the appointment process. But that disagreement in turn masks a profound division over the proper role of government in general, and even the very notion of the rule of law. As is often the case, it is well to begin with a review of the founders' understanding of the process in assessing this disagreement.

I. THE FRAMERS OF THE CONSTITUTION ASSIGNED TO THE PRESIDENT THE PRE-EMINENT ROLE IN APPOINTING JUDGES.

A. The President Alone Has The Power to Nominate

Article II of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court [and such inferior courts as the Congress may from time to time ordain and establish]."[4] As the text of the provision makes explicitly clear, the power

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[1] William H. Rehnquist, *2001 Year-End Report on The Federal Judiciary* <www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html> (visited May 23, 2002)

[2] Reaction of Sen. Patrick Leahy, D-Vt., Ranking Member, Senate Judiciary Committee,To Chief Justice Rehnquist's Year-End Report On The Federal Judiciary, Dec. 31, 1997 (visited June 2, 2002) <http://leahy.senate.gov/press/199801/980101.html>. *See* further 143 CONG. REC. S2518 (1997) (remarks of Mr. Leahy).

[3] Letter to Caleb Wallace, (Aug. 23, 1785) *in* MADISON: WRITINGS 39, 42 (J. Rakove ed. 1999).

[4] U.S. CONST. art. II § 2 cl. 2; art. III § 1.

to choose nominees—to "nominate"—is vested solely in the President,[5] and the President also has the primary role to "appoint," albeit with the advice and consent of the Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one that is currently being claimed.

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison's notes, an initial proposal on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, "even that branch [was] too numerous, and too little personally responsible, to ensure a good choice."[6] Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Governeur Morris of Pennsylvania, two of the Convention's leading figures, agreed with Ghorum and moved that judges be appointed by the President.

In contrast, Luther Martin of Maryland and Roger Sherman of Connecticut argued in favor of the initial proposal, contending that the Senate should have the power because, "[b]eing taken fro[m] all the States it [would] be best informed of the characters & most capable of making a fit choice."[7] And Virginia's George Mason argued that the President should not have the power to appoint judges because (among other reasons) the President "would insensibly form local & personal attachments . . . that would deprive equal merit elsewhere, of an equal chance of promotion."[8]

Ghorum replied to Mason's objection by noting that the Senators were at least equally likely to "form their attachments."[9] Giving the power to the President would at least mean that he "will be responsible in point of character at least" for his choices, and would therefore "be careful to look through all the States for proper characters." For him, the problem with placing the appointment power in the Senate was that "Public bodies feel no personal responsibility, and give full play to intrigue & cabal,"[10] while if the appointment power were given to the President alone, "the Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."[11]

Seeking a compromise, James Madison suggested that the power of appointment be given to the President with the Senate able to veto that choice by a ⅔ vote.[12] Another compromise was suggested by Edmund Randolph, who "thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal."[13] These compromises were defeated, however, and the vote on Ghorum's motion—that the President nominate and with the advice and consent of the Senate, should appoint—resulted in a 4–4 tie.[14] The discussion was then postponed.

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[5] *See* also *Weiss* v. *United States*, 510 U.S. 163, 185 n. 1 (1994) (Souter, J., concurring) ("the President was . . . rightly given the sole power to nominate").

[6] 2 M. Farrand, Records of the Federal Convention 41 (1911).

[7] *Id.*

[8] *Id.* at 42. Mason's objections were actually more complicated. He argued that the President should not appoint judges because the judges might try impeachments of the President. This problem was later avoided by having the Senate try impeachments with the Chief Justice of the Supreme Court merely presiding. *See* U.S. CONST. art. I § 3 cl. 6. Governeur Morris, in replying to Mason, argued that impeachments should not be "tried before the Judges." FARRAND, *supra* note 6 at 41–42. Mason also worried that "the Seat of Govt must be in some state," and the President would form personal attachments to people in that state, which might exclude citizens of other states from the federal bench—an understandable objection from an antifederalist like Mason. This problem was at least partly obviated by placing the capital in a federal district which would not be subject to the jurisdiction of any state. *See* U.S. CONST. art. I § 8 cl. 17.

[9] FARRAND, *supra* note 6 at 42.

[10] *Id.*

[11] *Id.* at 43.

[12] *Id.* at 42.

[13] *Id.* at 43.

[14] The Convention voted by state. Georgia abstained from this vote, and Rhode Island never sent a delegate. Other states' delegates were sometimes absent for various reasons—for instance, although the Convention had been under way for more than a month, New Hampshire's delegates had still not arrived. In addition, this debate came during one of the lowest points of the Convention, when the differences between the delegates was at its severest. New York delegates, Robert Yates and John Lansing, had left the Convention on July 10, opposed to all its proceedings. New York's third delegate, Alexander Hamilton, had left ten days earlier. *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 140 (Book of the Month Club, 1986) (1966). The day Lansing and Yates left the Convention, Washington wrote to Hamilton that he "almost despaired" of the Convention's success. *See id.* at 185–186. (Hamilton returned to the Convention in September and was New York's only signer). Thus the vote on July 18 was Mas-

Continued

When the appointment power was taken up again on July 21, the delegates returned to their previous arguments. One side argued that the President should be solely responsible for the appointments, because he would be less likely to be swayed by "partisanship"—what Madison's generation called "faction" [15]—than the Senate. The other side opposed vesting the appointment power in the President for a similar reason: he would not know as many qualified candidates as the Senate would, and might still be swayed by personal considerations or nepotism.

The convention delegates were primarily concerned about improper influence in the appointments process, and most of the debate centered on whether assigning the appointment power to the President or to the Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent such political bargaining. As Edmund Randolph noted, "[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications." [16] But those who opposed this idea, and instead wanted the Senate to have the power of appointment, did *not* argue that the Senate should have the power in order to control the development of case law or regulate judicial philosophy. Instead, they feared that the President would be "more susceptible to caresses & intrigues than the Senate," as Oliver Ellsworth of Connecticut contended.[17]

In the end, the Convention agreed that the President would make the nominations, and the Senate would have a limited power to withhold confirmation as a check against political patronage or nepotism. Governeur Morris put the decision succinctly: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." [18] As the Supreme Court subsequently recognized, "the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body." [19] No one argued that the Senate's participation in the process should include second-guessing the judicial philosophy of the President's nominees or attempting to mold that philosophy itself. Indeed, such a suggestion was routinely rejected as presenting a dangerous violation of the separation of powers, by allowing the Senate to control the President's choices and, ultimately, intrude upon the judiciary itself.

Madison, for instance, arguing in defense of his suggested compromise—that a ⅔ vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand-noted that

> The Executive Magistrate wd be considered as a national officer, acting for and equally sympathizing with every part of the U. States. If the 2d branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States. . . .[20]

In short, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role; such would undermine the President's responsibility, and far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared.

This understanding of the appointment power was reaffirmed during the ratification debates. In *Federalist* 76, for example, Alexander Hamilton explained at length that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment." [21] Noting that a President would "have *fewer* personal attachments to gratify, than a body of men who may each be supposed to have an equal number," [22]—or as we would say today, that the President will be swayed by fewer political pressure groups than the Senate—Hamilton concluded:

> In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation

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sachusetts, Pennsylvania, Maryland and Virginia in favor of Ghorum's motion, and Connecticut, Deleware, North Carolina and South Carolina against.

[15] *See* THE FEDERALIST NO. 10 & 51 (C. Rossiter ed. 1961).

[16] FARRAND, *supra* note 6 at 81.

[17] *Id.*

[18] *Id.* at 539.

[19] *Edmond* v. *United States*, 520 U.S. 651, 659 (1997).

[20] FARRAND, *supra* note 6 at 81.

[21] THE FEDERALIST NO. 76 at 455 (C. Rossiter, ed. 1961).

[22] *Id.* at 456 (emphasis in original).

> of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.[23]

Note the very limited role that the Senate serves in Hamilton's view—which, of course, echoes the views expressed at the Constitutional Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders' view, the Senate acts as a brake on the President's ability to fill offices with his own friends and family members rather than qualified nominations, but beyond that, the element of choice—the essence of the power to fill the office—belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in *picking* the nominees—either through direct choice or through logrolling and deal-making.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate—as he writes, legislatures are very often prone to "bargain[s]" by which one party says to another, "'Give us the man we wish for this office, and you shall have the one you wish for that.'"[24] But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates, because under the Constitutional scheme, all would understand that the power of appointment belonged in the President alone. That understanding, as we shall see, has been eroded in recent years.

Commenting on the prevailing understanding, Joseph Story later described the President's power to nominate as almost absolute. "The president is to nominate," Story noted, "and thereby has *the sole power* to select for office."[25] Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because "if he should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour. . . . At all events, he would be less likely to disregard [public disapprobation] than a large body of men, who would share the responsibility and encourage each other in the division of the patronage of the government."[26]

B. The Framers Envisioned A Narrow Role for The Senate in The Confirmation Process.

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the *confirmation* phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell—later a Justice of the Supreme Court himself—noted during the North Carolina Ratification Convention, "[a]s to offices, the Senate has no other influence but a restraint on improper appointments. . . . This, in effect, is but a restriction on the President."[27]

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the president." To Adams, the President should be *solely* responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate . . .?"[28] The appointment power is, Adams wrote, an "executive

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[23] *Id.* at 456–457.

[24] *Id.* at 456.

[25] Story, Commentaries on the Constitution of the United States § 1525 (emphasis added) (1833).

[26] Story, *supra* note 25 at § 1523.

[27] James Iredell, *Debate in the North Carolina Ratification Convention*, July 28, 1788, *reprinted in* 4 THE FOUNDER'S CONSTITUTION 102 (P. Kurland & R. Lerner eds. 1987).

[28] Letter to Roger Sherman (July 20, 1789) *in id.* at 106–107. John Adams was a lifelong champion of judicial independence. *See* John Adams, *The Independence of The Judiciary: A Controversy between William Brattle And John Adams* (1773) *reprinted in* 2 THE WORKS OF JOHN ADAMS 511 (Easton Press, 1992). He was the author of the Massachusetts state constitution, which Ghorum cited as his precedent for giving the President the power to appoint, and the Senate to advise and consent on, judicial nominees. *See* 1 PAGE SMITH, JOHN ADAMS 440 (1962)

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matter[],'' which should be left entirely to ''the management of the executive.'' [29] James Wilson echoed this view: ''The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune, should be responsible. He should be alike unfettered and unsheltered by counsellors.'' [30]

In discussing the analogous situation of executive appointments—such as ambassadors or cabinet members—James Madison asked, ''Why . . . was the senate joined with the president in appointing to office . . .? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here, the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government.'' [31]

The Senate's confirmation power therefore acts only as a relatively minor check on the President's authority—it exists only to prevent the President from selecting a nominee who ''does not possess due qualifications for office.'' [32] Essentially, it exists to prevent the President from being swayed by nepotism or mere political opportunism.[33] Assessing a candidate's ''qualifications for office'' did not give the Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.

C. Ideology Was Not Considered A Proper Reason for Refusing Confirmation, As Long As It Did Not Prevent The Nominee From Fulfilling The Judicial Oath.

In the founders' view, then, the Senate's power in the confirmation of judicial appointees was extremely limited. It existed solely to prevent the President from exercising his power in an improper manner. Ideology—at least ideology of the kind that is unrelated to a candidate's ability to fulfill his oath of office—simply had no place in the Senate's decision. As Hamilton wrote, ''It will be the office of the President to nominate, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice he may have made.'' [34] It was not that the founders believed the political views of judges were irrelevant; they were not that naíve. But in their view, the President was alone responsible for his appointments, and, in turn, the ideology of those he appointed.[35]

There is, of course, an early case that suggests the Senate believed that it was appropriate to reject nominees because of their political ideology. In 1795, John Rutledge of South Carolina, former delegate to the Constitutional Convention, was nominated by President Washington to be Chief Justice of the United States. Although Rutledge took his seat and presided over two cases, he was never confirmed.

(''even with minor changes and deletions and one major change in the article dealing with religious freedom, the constitution [of Massachusetts] was Adams' handiwork''); DAVID MCCOLLOUGH, JOHN ADAMS 220–222 (''it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected . . . that Adams made one of his greatest contributions not only to Massachusetts, but to the country, as time would tell.'' *Id.* at 222).

[29] *Id.* at 107. *See also* James Madison, *Speech in Congress on the Removal Powe*r, June 16, 1789, *reprinted in* RAKOVE, *supra* note 3 at 453, 456 (''if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws.'')

[30] James Wilson, *Lectures on Law* (1791), *reprinted in id.* at 110. *See also* Americanus (John Stevens Jr.), No. VII (Jan. 21, 1788) *reprinted in* 2 DEBATE ON THE CONSTITUTION 58, 59 (B. Bailyn ed. 1993) (''Instead of controling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government *solely* to the President. . . .'').

[31] James Madison, *Speech in Congress on the Removal Power*, May 19, 1789, *reprinted in* RAKOVE, *supra* note 3 at 434, 436.

[32] Story, *supra* note 30

[33] It might seem ironic, then, that President Washington nominated his nephew, Bushrod Washington, to the Supreme Court in 1798. But Justice Washington was easily confirmed and served a long and successful term on the Supreme Court. His most famous opinion, *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), was an important early case interpreting the Privileges and Immunities Clause in Article V.

[34] THE FEDERALIST NO. 66, at 405 (C. Rossiter ed. 1961) (emphasis in original).

[35] This is not to say that the founding generation did not use the confirmation power as a political tool. It and subsequent generations have done so very frequently. *See* Jeffrey K. Tulis , *The Appointment Power: Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. 1331 (Summer 1997). But in these confirmation battles, the Senate more often used its power to block nominees in opposition to the President's policies, not in order to enforce a particular vision of the Constitution. In the original understanding, judicial *philosophy* was a matter for the President's consideration. In those unusual cases in which the Senate *did* attempt to enforce an orthodoxy on the Court, the Senate was subjected to severe criticism.

Rutledge was a vocal opponent of the controversial Jay Treaty, negotiated by President Washington's envoy to England—and first Chief Justice of the United States—John Jay.[36] Shortly after his nomination, Rutledge delivered an emphatic and somewhat imprudent attack on the Treaty, which was supported by the Federalist majority in Congress. Rutledge's appointment was rejected shortly thereafter on December 15, 1795, almost immediately after Congress resumed its work after a recess.[37] Although the Senate's refusal to confirm Rutledge might in part be due to questions about his mental stability,[38] his opposition to the Jay Treaty undoubtedly played an important role in the vote. Thomas Jefferson complained privately that "[t]he rejection of Mr. Rutledge by the Senate is a bold thing; because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but tories hereafter into any department of the government."[39]

Jefferson's supporters in Congress responded in kind after Jefferson was elected President. Attempting to expand Jefferson's own control over the courts beyond what was permitted in the normal course of filling vacancies, the Jeffersonian Republicans brought articles of impeachment against Supreme Court Justice Samuel Chase, a Federalist opponent of the administration.[40] Jefferson's supporters in Congress had been successful in impeaching New Hampshire District Judge John Pickering for bad behavior—Pickering was insane[41]—but success in impeaching him emboldened members of Jefferson's party to impeach Justice Chase, who had been appointed in 1796 by John Adams, and had attempted to enforce the notorious Sedition Act.[42] Articles of impeachment against Chase were drawn up by Virginia Congressman John Randolph of Roanoke,[43] who was immediately challenged on the floor of the House. "[T]he streams of justice should be preserved pure and unsullied," said one Congressman:

> The Judicial department ought to attach to itself a degree of independence. I am of opinion that this House possesses no censorial power over the Judicial department generally, or over any judge in particular. They have alone the power of impeaching them; and when a judge shall be charged with flagrant misconduct . . . I shall be at all times prepared to carry the provisions of the Constitution into effect, in virtue of which great transgressors are punishable

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[36] For more on the Jay Treaty, *see* Thomas A. Bailey, A Diplomatic History of the American People 75–82 (7th ed. 1964); James MacGregor Burns, The Vineyard of Liberty 102–105 (Vintage Books, 1983) (1982).

[37] Washington's nomination of Rutledge was delivered to the Senate on December 10, 1795. *See* SENATE EXECUTIVE J. at 194 (Dec. 10, 1795). The nomination was delayed and finally rejected on December 15. *See id.* at 195–196. No official record exists of floor debates on the nomination.

[38] *See* David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 998 (Fall, 2000) (noting that some contemporary observers claimed that "after the death of his Wife, his mind was frequently so much deranged, as to be in a great measure deprived of his senses"). As Garrow notes, "Professor Haw concludes that the nomination 'was defeated primarily for political reasons,' but even in the weeks immediately preceding the Senate's vote, Chief Justice Rutledge's mental health appears to have taken a very decided turn for the worse. In November, while riding circuit in North Carolina, Rutledge became seriously ill, and his illness exacerbated his depression to such an extent that on his way home to Charleston Rutledge apparently tried 'to drown himself at Camden' but without success" *Id.* at 1000. *See also* Letter of James Madison to Thomas Jefferson, (Feb. 7, 1796) in 2 THE REPUBLIC OF LETTERS 917, 919 (J. Smith ed. 1995) ("There is some reason to think that Jno. Rutledge is not in his mind"). *But see* Matthew D. Marcotte, *NOTE: Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 538–539 (2001/2002) (arguing that allegations of Rutledge's insanity were a tool in the partisan campaign against Rutledge).

[39] Letter to William Branch Giles (Dec. 31, 1795) *in* 9 WRITINGS OF THOMAS JEFFERSON 318 (A. Bergh ed. 1907).

[40] David Mayer argues that Jefferson "gave only lukewarm support" to the attempt to impeach Chase. DAVID MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 273 (1994). Dumas Malone shares this view. DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805 at 468–469 (1970). For an interesting evaluation of the impeachment power as a mechanism for redressing the problem of faction, *see* Jonathan Turley, *Senate Trials And Factional Disputes: Impeachment As A Madisonian Device*, 49 DUKE L.J. 1 (Oct. 1999).

[41] President Jefferson referred the question of Judge Pickering's impeachment to the Congress on February 4, 1803. *See* 13 *ANNALS OF CONG.* 460 (1803). The House reported articles of impeachment to the Senate on March 2. *Id.* at 642. The Senate took up the impeachment proceedings on October 26. 13 ANNALS OF CONG. 315. The actual trial began January 4, 1804. *Id.* at 317.

[42] Act of July 14, 1798, 1 Stat. 596 (1798).

[43] Randolph was a cousin of Jefferson's, but while he started out as a leading member of Jefferson's party, he ended up being Jefferson's chief antagonist in the House. *See* ALF MAPP, THOMAS JEFFERSON: PASSIONATE PILGRIM 41–42 (1991).

> for their crimes. . . . If the resolution pass in its present form, it appears to me that we shall thereby pass a vote of censure on this judge, which neither the Constitution nor laws authorize.[44]

Popular outcry against Chase's impeachment was swift. "The simple truth is," one newspaper said, that "Mr. Jefferson has been determined from the first to have a judiciary, as well as a legislature, that would second the views of the executive."[45] "I am afraid," said another Congressman, "that unless great care be taken the doctrine of judicial independence will be carried so far as to become dangerous to the liberties of the country."[46] Randolph insisted that he was not seeking impeachment for ideological reasons but based on Chase's bad behavior. In a charge to a grand jury in a Sedition Act case in Baltimore, Chase had let fly with a political screed against the Jefferson Administration, and supporters of impeachment argued that this demonstrated Judge Chase's own ideological bias.[47] Yet few were persuaded. To the Federalists, the Chase impeachment was motivated purely by the political ideology of the Jeffersonians. As John Quincy Adams wrote in his diary, "this was a party prosecution."[48]

The Senate ultimately voted *not* to convict Justice Chase, and the Congress backed away from the ideological litmus test that threatened the independence of the judiciary. As one commentator has noted, "[a]t that early stage of the republic, a successful impeachment of a Supreme Court Justice innocent of criminal activity probably would have left the judicial branch of the federal government forever dependent on the legislative."[49] As a result, the use of impeachment to enforce political orthodoxy on the Supreme Court was abandoned. In 1970, when then-Congressman Gerald Ford denounced Justice William O. Douglas on the floor of the House and called for his impeachment, the suggestion was doomed from the start.[50]

II. THE CURRENT STATE OF THE CONFIRMATION POWER.

A. Why Ideology Matters to The Left.

Despite the original understanding of the Senate's limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criteria for judicial confirmation, the Senate today appears bent on using its limited confirmation power to impose ideological litmus tests on presidential nominees and even to force the President to nominate judges preferred by individual Senators, thus arrogating to itself the nomination as well as the confirmation power.

The Senate's expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary—and of government in general—in the lives of Americans today, the Senate's part in the nomination process has become a powerful political tool, and, like all powerful political tools, it is the subject of a strenuous competition among interest groups every time the President seeks to fill a judicial vacancy. Nevertheless, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate's ideological use of the confirmation power threatens the separation of powers

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[44] 13 ANNALS OF CONGRESS 807 (1804) (statement of Mr. Elliott).

[45] MALONE, *supra* note 40 at 469 (*quoting New York Evening Post*, Jan. 20, 1804).

[46] 13 ANNALS OF CONGRESS 808–809 (1804).

[47] MAYER, *supra* note 40 at 268–276, discusses Jefferson's view of the proper role of ideology in the judiciary—a view too complex to address fully here. In brief, "Jefferson's constitutional theory . . . relied upon the independence of the judiciary as a guardian of individual rights against executive and legislative tyranny; [so] his quarrel with the judiciary was that under the control of the Federalists, it failed to fulfill this vital function and had become the destroyer rather than the protector of the Constitution and citizens' liberties." *Id.* at 268. As I argue infra, section II, today's attempt by Senate liberals to delve into the ideology of judicial nominees gets this Constitutional theory backwards: their quarrel with the judiciary is precisely that it threatens to place roadblocks in the way of the left's attempt to increase government control over citizens' lives. Where Jefferson believed the judiciary should not be independent "of the will of the people," modern liberals want the judiciary dependent on the will of *political interest groups*. Witness the liberal reaction to the recall of California Chief Justice Rose Bird—an expression of "the will of the people" which the left denounced as a corruption of the rule of law by thoughtless mob rule. *See* Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985 (Sept. 1988). Witness also the notion of a "living Constitution," by which unelected judges exercise the power to nullify duly enacted laws based on their own unaccountable consciences.

[48] THE DIARY OF JOHN QUINCY ADAMS 1794–1845 at 35 (Allan Nevis ed., 1928). Adams, of course, would become much more familiar with such "party prosecutions" late in his career, when the House of Representatives attempted to expel him for his outspoken opposition to slavery. *See* WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY (1996).

[49] MAPP, *supra* note 43 at 89.

[50] *See generally* Bob Woodward & Scott Armstrong, The Brethren 75–79 (1979).

by undermining the responsibility for appointments given to the President, by demanding of judicial nominees a commitment to a role not appropriate to the courts, and, perhaps most importantly, by threatening the independence of the judiciary itself.

The reason that some Senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a "living document," modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called "progressive" policies that could never emerge from the legislative process. Of course, the Constitution is based on a profoundly different notion of law than is modern liberalism, and it is no wonder, therefore, that President Franklin D. Roosevelt, the godfather of the Welfare State that lies at the center of modern liberalism, found it necessary to resort to the highly questionable "Court-packing plan" of 1936 in order to enforce his "vision" of a new political order. The Constitution simply was not designed to accommodate such things as the massive redistributions of wealth or bureaucratic restrictions on individual liberty that Roosevelt was proposing—in fact, it was designed precisely to prevent such things.[51] As Rexford Tugwell, one of the principal architects of the New Deal, admitted, "To the extent that [the New Deal policies] developed, they were tortured interpretations of a document intended to prevent them."[52] So the Constitution was essentially re-written by interpretation, culminating in the great "Switch in Time That Saved Nine," in which a century and a half of precedent was reversed and the Constitution stretched and torn out of shape to accommodate the New Deal programs.[53]

Judicial ideology is therefore critically important to modern-day liberals because any honest reading of the Constitution reveals that it is incompatible with their scheme of government.

Senator Schumer, for example, has been quite candid in acknowledging that his opposition to President Bush's judicial nominees is based on the fact that they respect and will enforce the Constitution's limitations on the power of Congress. "Elected officials," Senator Schumer told the press on May 9, 2002,

> should get the benefit of the doubt with respect to policy judgments and courts should not reach out to impose their will over that of elected legislatures. . . . Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve—these decisions affect, in a fundamental way, our ability to address major national issues like discrimination against the disabled and the aged, protecting the environment, and combating gun violence.[54]

This is not to say that ideology should never play a role in the confirmation process. Some ideologically-based views render it impossible for a nominee who holds them to fulfill his oath of office. Consider, for instance, Judge Harry Pregerson, who, when he was nominated to the Court of Appeals for the Ninth Circuit by President Carter, was asked whether he would follow his conscience or the law, if the two came into conflict. "I would follow my conscience," he replied.[55] That statement, grounded in Pregerson's own ideology, should easily have been grounds for disqualification, yet Pregerson was not only confirmed to the bench, but roundly praised for this statement, despite the fact that it threatens to undermine the very essence of constitutionalism and the rule of law.[56]

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[51] *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1935) ("The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities").

[52] Quoted in Roger Pilon, The Purpose And Limits of Government 31(Cato Institute 1999).

[53] *See generally* Thomas Fleming, The New Dealer's War: FDR And The War within World War II 59–62 (2001); Hadley Arkes, The Return of George Sutherland (1994); Timothy Sandefur, *The Common Law Right to Earn A Living*, 75 Independent Review 51 (Summer 2001); Bernard Seigan, Economic Liberties And The Constitution (1980). *See further United States* v. *Carolene Products*, 304 U.S. 144, 152 (1936); *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 398 (1937); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937).

[54] Statement at Courts Subcommittee hearing, May 9, 2002 (visited May 26, 2002) <http://schumer.senate.gov/SchumerWebsite/pressroom/press—releases/PR00978.html>.

[55] John Johnson, Judge Harry Pregerson, Choosing between Law And His Conscience, LOS ANGELES TIMES, May 3, 1992 at B5.

[56] In 1992, Judge Pregerson ordered a stay to the execution of the serial killer Robert Alton Harris, the *fourth* such stay that was issued on the night of Harris' scheduled execution. The result was an unprecedented decision from the Supreme Court of the United States, ordering that "no further stays of Robert Alton Harris' execution shall be entered by the federal courts

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Contrast this with Justice Antonin Scalia, who in a recent speech said that he was glad the Pope had not declared the Catholic Church's opposition to the death penalty a matter of infallible Church doctrine, because if the Pope had done so, Justice Scalia would, as a practicing and committed Catholic, feel compelled to resign, unable to abide by his oath to enforce the law. In his view,

> the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. . . . This dilemma, of course, need not be confronted by a proponent of the "living Constitution," who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the "living Constitution" has such attraction for us judges.)[57]

Ideology understood in this light is of course relevant in selecting a judicial nominee. Broadly understood, such "ideology" would encompass a nominee's honor and character, which are necessary to fulfill the oath of office.[58] A nominee who for ideological reasons cannot "support and defend the Constitution of the United States"—say, an agent working for the Taliban—would be unfit for office because he would lack the *qualifications* necessary for the position. In fact, although we tend to take the concept of an oath lightly today, James Madison wrote that under the Constitution, "*the concurrence of the Senate* chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public Opinion, [would be] relied on as *guarantying their impartiality*. . . ."[59] This is very different than demanding of a nominee that he toe the line of leftist jurisprudence.

Today, Senators inquire into a nominee's ideology for precisely the opposite reason: to ensure that the nominee will *not* abide by the Constitution or his oath to support it—to ensure, rather, that he will stretch and bend the Constitution in the directions that the Senator prefers.

On top of the danger that this presents to the fair resolution of controversies in Constitutional law, it presents a great danger to another vital principle of American government: separation of powers. In *Federalist* 78, Alexander Hamilton declared the judiciary the "least dangerous branch" of the new federal government. "[T]he general liberty of the people can never be endangered" by the judiciary, he wrote, "so long as the judiciary remains truly distinct from both the legislature and the Executive. . . . [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." "[A]ll the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation."[60] The enforcement of political orthodoxy on the bench is creating precisely this dependence, strengthened even more by demands for judicial "deference" to Congressional acts that exceed the limited scope of the federal government's Constitutional powers.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution," wrote Hamilton. The courts alone could "declare all acts contrary to the manifest tenor of the Constitution void."[61] But the current attempt to block judges who believe in limited government is not motivated by a desire to maintain inviolate the "exceptions to the legislative authority." It is motivated by a desire to ensure that the judiciary will interpret the Constitution in a way most suited to *extend* that legislative authority as far as possible.

What that essentially means is that the current attempt to use the Senate's confirmation power to regulate the ideology of judges is part of an overall trend which is turning the *judiciary* into a second *legislative* branch. The fundamental differences between the legislative and the judicial branch is that in the former, parties lobby, contend, vote, and decide on procedures that may infringe on the private rights of individuals. The courts are supposed to act as a "countermajoritarian"

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except upon order of this Court." *Vasquez* v. *Harris*, 503 U.S. 1000 (1992). *See further* Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188–92.

[57] Antonin Scalia, *God's Justice And Ours*, FIRST THINGS, May 1, 2002 at 17.

[58] The oath of office is prescribed in U.S. CONST. art. VI § 3.

[59] Letter to Thomas Jefferson (June 27, 1798), *in* RAKOVE, *supra* note 3 at 801 (emphasis added).

[60] THE FEDERALIST NO. 78 at 466 (C. Rossiter ed. 1961).

[61] *Id.*

mechanism to ensure that the legislature does not engage in "the invasion of private rights . . . from acts in which the Government is the mere instrument of the major number of the constituents."[62] The very existence of the judiciary is premised on the fact that the majority is not always right. Allowing the Senate—elected by the majority—too great a hand in regulating the federal bench risks eroding the judiciary's power to perform this most crucial task.

B. The Dangerous Techniques of Today's Judicial Confirmation Process.

One of the most disturbing manifestations of the new process is the growing tendency of the Senate to *refuse even to hold hearings* for nominees. This practice suggests not that the nominees are too far outside the ideological mainstream to be confirmed, but rather that the Senators fear to vote down the nominees on ideological grounds, precisely because they are *not* outside the ideological mainstream.

Even those who argue that the Senate should take a large role in molding the judiciary must acknowledge that blocking nominations by refusing to hold hearings is an inappropriate tactic. The Senate has the power to advise and consent to a President's nominees. The refusal to hold hearings at all is not advise or consent; it is political blackmail which perpetuates the critical number of vacancies on the federal bench. In fact, as one author has noted, senatorial inaction is contrary to a resolution passed by the very first Senate in 1789, which declared that "when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration . . . and the Senators shall signify their assent or dissent by answering, *viva voce*, ay or no."[63]

Moreover, the current strategy of delay that appears to be the mainstay of the present Senate Judiciary Committee threatens to intrude upon the Executive's powers, in violation of core separation of powers principles. Improper attempts to impose ideological litmus tests by voting down the President's nominees could be countered by re-nomination of like-minded individuals, but the outright refusal even to hold hearings, or to refer nominees to the floor of the Senate for a vote, deprives the President of even this remedial power, eventually forcing the President to accede to demands to nominate individuals more to the liking of individual Senators. The delay tactics appear designed, then, to transfer the nomination power from the President to the Senate, a result that the founders greatly feared.[64]

It is very important to note an interesting claim made by some Senate Democrats in defense of their refusal to hold hearings on President Bush's nominees. Many of them—for instance, Senator Leahy—argue that they have actually confirmed quite a lot of judges, and that Republicans are simply lying when they complain about the slow pace of Senator Leahy's Judiciary Committee.[65] But, in fact, most of the judges that have been confirmed are *district* court judges, a very important component of the judicial system, to be sure, but not the final word on the law, the way Circuit Judges are in the vast majority of cases. Of the eleven circuit court nominees President Bush made on May 9, 2001—seventeen months ago and counting as of yesterday—only six have received hearings. Two of these, Judges Barrington Parker Jr. and Roger Gregory, were confirmed relatively quickly[66] because they were *Clin-*

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[62] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) *in* RAKOVE, *supra* note 3 at 418, 421.

[63] SENATE EXECUTIVE J. at 19 (Aug. 21, 1789) cited in Lee Renzin, *NOTE: Advice, Consent, and Senate Inaction: Is Judicial Resolution Possible?* 73 N.Y.U. L. REV. 1739, 1755 (Nov. 1999).

[64] The arrogation of the nomination power to individual Senators is also evident in new structures that have been devised for the selection of district court judges. Patterned after the commissions established by Gerald Parsky in California with the enthusiastic support of Senators Feinstein and Boxer, these "vetting" commissions essentially have veto power over candidates submitted for the President's consideration. Because the committees are structured so that block voting by the Feinstein and Boxer appointees can prevent any candidate's name from being forwarded to the White House, the commissions amount to much more than "advice" to the President. They represent a transfer of the nomination power itself to individual Senators, Senators who are not even members of the President's own political party. Reportedly, the appointees of Senators Feinstein and Boxer have used this new-found power to question candidates about their religious views, in violation of the Constitution's ban on religious tests, *see* U.S. Const. Art. VI, cl. 3, and about their positions on cases likely to come before the candidate as judge, in violation of the Canons of Judicial Ethics. *See generally*, John Fund, "Boxer Rebellion," *Wall Street Journal*, June 5, 2002.

[65] *See* Statement of Sen. Leahy (May 23, 2002) (visited May 29, 2002) <http://judiciary.senate.gov/member—statement.cfm?id=268&wit—id=50>.

[66] Judge Parker was nominated on May 9, 2001 and confirmed on October 11, 2001. *See further* David G. Savage, *Bush's Judicial Nominees Go 28 for 80 in The Senate*, LOS ANGELES TIMES, Dec. 31, 2001 at A12. Judge Gregory was nominated on May 9, 2001 and confirmed on

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ton nominees, whom President Bush re-nominated in a show of bipartisanship. The others, Judge Charles Pickering, Justice Priscilla Owen, Professor Michael McConnell, and former deputy Solicitor General Miguel Estrada, waited over a year for their hearings, and then were given hearings only after far-left interest groups thought they had dug up enough dirt to scuttle the nominations. The Senate Judiciary Committee refused, by straight party-line vote, to report Judge Pickering and Justice Owen out of committee, and it appears poised to do the same with Michael McConnell and Migual Estrada, both of whom have received unanimous well-qualified ratings from the American Bar Association. The remaining five have not even received a hearing, 519 days and counting since their nominations were first announced: John Roberts, one of the leading Supreme Court practitioners of the day, nominated to the D.C. Circuit for the second time, his nomination by the elder Bush having likewise been stalled until it died with the expiration of the Congressional session following President Bush's defeat to Bill Clinton; Terrence Boyle, nominated to the Fourth Circuit for the second time, his nomination by the elder Bush also having been stalled until it died after the 1992 election; Dennis Shedd, also nominated to the Fourth Circuit; and Deborah Cook and Jeffrey Sutton, both nominated to the Sixth Circuit.

Even taking Democrats at their word that their refusal to confirm President Bush's nominees is an exercise of legitimate Congressional power to protect us from diabolical judges, one cannot justify the *refusal to hold hearings* or have confirmation votes by the full Senate. If these judges are so dangerous, Congress should hold the hearings and vote them down. But the fact is that these nominees are in general not just of unobjectionable character but of impeccable character, with outstanding legal minds. Democrats refuse to hold hearings precisely because, if they did so, it would become clear that the Democrats have no legitimate objections to them and that, in fact, they enjoy majority support in the Senate, including support by some Democrats. The delays are meant as a starvation campaign—or, worse, to bide time for radical interest groups to discover (or invent) grounds for objecting to the nominees.

This tactic, too, has been previously addressed by the Senate. After Andrew Jackson defeated John Quincy Adams for President in 1828, Adams had several months as a lame duck President in which to nominate Judges to the federal bench. Because he no longer had the confidence of the people, several Senators wanted to postpone consideration of John J. Crittendon, whom President Adams had nominated as an Associate Justice of the Supreme Court. Although the Senate ultimately rejected the Crittendon nomination, the arguments made against the delay were profoundly important and ultimately carried the day throughout most of this nation's history. Senator Holmes argued, for example, that although the Senate had a right to deliberate and look into the character and qualifications of a candidate, it had "no constitutional power to resist its execution." Delays beyond what were necessary to deliberate about the nominee's qualifications were, he asserted, "an *abuse* of a discretion" given by the Constitution.[67] Senator Johnson echoed the sentiment, stating that "The duty of the Senate is confined to an inquiry into the character and qualifications of the person, and to a decisive action upon the nomination, in a reasonable time."[68] Johnson made the following dire prediction: "The moment you depart from the constitution, and begin an attack upon the other departments of the Government, you commence a conflict of authority where there is no arbiter, which will end in perpetual collision, or in the destruction of the Government."[69] That, and the similar prediction by Senator Chambers—"Once let discretion be adopted as the rule of conduct for those in power, and no man can prescribe limits to the mischief which must ensue"[70]—should give us all pause at the actions, or rather inaction, currently being undertaken in the Senate.

Another dangerous change that has occurred in the confirmation procedures involves an expansion of the so-called "blue slip" policy—the practice whereby home state Senators are essentially given a veto power of the President's nominees to positions in that state.[71] Although the policy has always been constitutionally suspect[72]—the advice and consent power is given to the Senate as a body, not to indi-

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July 20, 2001. *See further* Jonathan Ringel, *Senate Confirms Three Bush Judicial Nominees*, THE LEGAL INTELLIGENCER, July 24, 2001 at 4.

[67] 5 Cong. Deb. 86, 88 (Feb. 2, 1829).

[68] *Id.* at 92.

[69] *Id.*

[70] *Id.* at 86.

[71] Brannon P. Denning, The "Blue Slip": Enforcing The Norms of the Judicial Confirmation Process, 10 WM. & MART BILL OF RTS. J. 75 (Dec. 2001).

[72] According to its defenders, the blue slip procedure enforces the Constitutional scheme of advice and consent by serving as a "formal sanction for violation of the Senate norm of the cour-

vidual Senators—as historically exercised it at least had some grounding in the original purpose that underlay the advice and consent clause. Home state Senators were extended this courtesy because it was assumed that they would have first-hand knowledge of nominees from their home state that would allow them to more adequately judge their character and fitness for office—just the kind of role envisioned by the framers of the clause.[73] More importantly, the blue slip practice, again as historically exercised, had natural limits protecting against its abuse. A Senator who went to the blue slip well too often could easily find that the President simply nominated a judge from another State in the Circuit.

Neither the original purpose nor the inherent limit is found in the current, expanded blue slip policy. Now, Senators essentially have a veto power over any nominee from the *entire circuit* in which their state is located, belying any claim to special knowledge of the nominee's character derived from home-state familiarity, and removing the one check on the policy's potential for abuse. Not surprisingly, without the check that was built in to the original policy, the blue slip has become a much more favored tool for advancing a Senator's own views, further undermining the President's constitutional role in appointments.

Ironically, senatorial inaction toward judicial nominations came under increasing fire during the Clinton Administration, when Democrats complained that the Republican-controlled Senate was refusing to confirm President Clinton's nominees.[74] Now that the tables have turned, however, Democrats are defending their inaction not only as a political game of turnabout-is-fair-play, but as a solemn duty to defend the Constitutional structure-the same structure, of course, that they have been vigorously undermining for at least seventy years.[75] Of course, the turn-about, tit-for-tat argument depends entirely on the starting point, and one need only query John Roberts and Terrence Boyle, both nominated originally in the first Bush administration, to rebut any claim that the "inaction" that has been attributed to the Republicans during the second term of the Clinton administration was the first shot in this confirmation war. In any event, one of the three main examples of Republican "inaction," Roger Gregory, was re-nominated to the Fourth Circuit by President Bush, promptly confirmed, and is now sitting on the bench. Confirmation of another, Merrick Garland, was delayed for a year by Senator Charles Grassley in response to the Democrat's stall of John Roberts,[76] but he was ultimately confirmed and now sits on the D.C. Circuit Court of Appeals. The final example, Helen White of Michigan, languished for several years, but Judge White was the sister-in-law of then-Senator Carl Levin. The blue-slip opposition by Michigan's other Senator to the blatant display of nepotism was precisely the kind of check on the appointment power envisioned by the framers; that opposition hardly serves as precedent for the broad-based delay and opposition to the highly qualified nominees currently before the Senate.

But inaction and the blue slip process are not the only tactics being indulged toward President Bush's nominees. Recently, Judge D. Brooks Smith received a remarkable letter from Senator Charles Schumer of New York, asking Smith

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tesy from *presidents*, who are expected to seek advice from Senators prior to making judicial appointments." *Id.* at 97. But the President is *not* expected to seek advice from *individual Senators*, or at least not from the two Senators from a nominee's home state, whose views will be based primarily on the nominee's party loyalty and the Senator's political ambitions. The Constitution expects the President to seek advice from the *Senate*. In fact, as the history of the Advice and Consent Clause shows, the founders would have preferred a system which required the President to seek the advice from Senators of states *other* than the nominee's home state, because they would be less likely to be influenced by that nominee's home-grown political connections. In any case, the Constitution does not confer the confirmation power on the home-state Senators; it vests it in the Senate, and only to prevent unqualified or politically driven nominations.

[73] *See* note 31, *supra*.

[74] *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 233 (Jan. 1997) (proposing a lawsuit to force the Senate to hold hearings on nominees); Renzin, supra note 63 (arguing that blue slip procedure and Senatorial inaction are unconstitutional). Of course, in reality, the Congress did not refuse to confirm President Clinton's judicial nominees—it confirmed 377, almost as many as were confirmed during the Reagan Administration (382), despite the fact that for six of his eight years in office, President Clinton was faced with a Senate majority of the opposite political party, while President Reagan had a Senate majority of his own party for six of his eight years in office.

[75] *See* Thomas G. West, The Constitutionalism of the Founders Versus Modern Liberalism, 6 NEXUS J. OP. 75 (2001).

[76] *See* Michael J. Gerhardt, "Toward a Comprehensive Understanding of the Federal Appointments Process," 21 Harv. J. L. & PUB. POL'Y 467, 516 (Spring 1998) (citing, e.g., Editorial, Judicial Gridlock, *Wash. Post*, July 10, 1996, at A16).

to imagine it is 1965 and you are a Supreme Court justice. The *Griswold* opinion[77] has not yet been written. Chief Justice Warren turns to you in conference and asks you for your opinion on whether there is a right to privacy in the Constitution and why. He further asks you to articulate how that right, if it exists, should be applied in *Griswold*. Please provide your answers to those inquiries.

Schumer was, in his own words, "interested in how you personally read and interpret the Constitution."[78]

Senator Schumer's questions quite obviously have nothing to do with preventing nepotism, or the appointment of incompetent political cronies, by the President. Instead, Senator Schumer's questions serve merely to test Judge Smith's commitment to the standard of "evolving constitutionalism" advocated by Schumer and some of his colleagues. Senator Schumer's question is designed precisely to elicit the nominee's political ideology in an attempt to enforce political orthodoxy on the bench. Yet Schumer is not "responsible" for the nomination in the sense that the founders envisioned. Citizens throughout most of the country who might be appalled by Senator Schumer's questions cannot vote Senator Schumer out of office. While President Bush, in nominating Judge Brooks, must be, in Madison's words, "considered as a national officer, acting for and equally sympathizing with every part of the U. States," Senator Schumer is only required to serve his liberal constituency in New York, comprised of groups such as the National Organization for Women, which targeted Judge Smith's nomination, claiming that he is "unfit" to be a Circuit Judge because he did not resign fast enough from a men's hunting club, and because, in its words, he has "ultraconservative buddies."[79]

A similar dynamic was at play in the Senate Judiciary Committee's rejection of Texas Supreme Court Justice Priscilla Owen to a seat on the U.S. Court of Appeals for the Fifth Circuit. The main source of opposition to Justice Owen was her vote to uphold a Texas statute requiring that minor girls notify their parents before obtaining an abortion. The Texas statute contained a judicial bypass mechanism, as required by existing Supreme Court precedent. In fact, there was little doubt that the statute was constitutional under prevailing precedent. The opposition to Justice Owen, then, was based on her refusal to ignore existing, binding Supreme Court precedent in favor of the expanded, unfettered right to abortion being propounded by the litigants in the case. What the opponents of Justice Owen wanted instead, apparently, was a judge who would ignore the law and existing Supreme Court precedent to advance her particular causes from the bench-like the Ninth Circuit judges whose recent attempt to strike down a Montana statute that, in full accord with prevailing Supreme Court precedent, required abortions to be performed by a physician, met with a rare, summary reversal by the Supreme Court without oral argument.[80]

In short, the opposition to Justice Owen, like Senator Schumer's opposition to Judge Smith, was ultimately grounded in the fear that they would honor their oaths and uphold the law rather than bend the law to their own will (or, more precisely, to the will of those who would vote to confirm them). That such is an abuse of the advice and consent process should be obvious, as should the intrusion upon both other branches of government—the President's power to nominate and the very independence of the judiciary in upholding the rule of law.

Of course, Congress has some constitutional power to create schemes for the advancement of such causes or other pet projects, such as the redistribution of wealth or restriction on private liberties and property rights—that is to say, it can propose constitutional amendments that would authorize such action. It could propose to repeal the constitutional protections for property rights found in the Fifth Amendment and elsewhere, by writing an amendment and submitting it to the states. But Congress knows that such an amendment would never succeed, so instead some members of Congress pursue this new method of enforcing their radical agenda from the bench.

This is essentially the difference between raw, abusive power and constitutional norms. Having failed to accomplish their policy goals in the constitutional fashion, some members of the Senate are attempting to accomplish them by submitting judi-

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[77] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[78] *Quoted in Byron York, Schumer's Attack*, NATIONAL REVIEW ONLINE, May 14, 2002 (visited May 23, 2002) <http://www.nationalreview.com/york/york051402.asp>.

[79] *NOW Activists Protest Nomination of D. Brooks Smith Outside Federal Court Building*, May 20, 2002, (visited May 23, 2002) <http://www.now.org/press/05–02/05–20.html>.

[80] *See Mazurek* v. *Armstrong*, 520 U.S. 968, 974 (1997) ("The Court of Appeals' decision is also contradicted by our repeated statements in past cases—none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them—that the performance of abortions may be restricted to physicians").

cial nominees to a vetting by radical interest groups who will decide whether the nominees can be relied upon to decide the "right" way on the cases that come before them. There is an interesting irony to this, however: in a sense, the Constitution already requires judges to decide the "right way"—that is, it requires judges to abide by an oath to "support and defend the Constitution." But it also requires Senators to do the same thing. Some Senators have arguably abandoned that duty by supporting and defending a governmental scheme totally alien to that contemplated by the framers. Now those Senators are seeking to weed out any judges who might force them to abide by that duty.

III. CONCLUSION

In June of 2001, President Clinton's White House Counsel, Lloyd Cutler, told the Senate Judiciary Committee that "it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts."[81]

Today the Senate is doing precisely what one delegate to the North Carolina ratification convention warned against: it is taking over the nomination power which the Constitution vested in the President alone. "[T]he President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed: He will be obliged finally to acquiesce in the appointment of those which the Senate shall nominate, or else no appointment will take place."[82] The dangers posed by such a system are as real today as they were to the founding generation. It is time to rid ourselves of all ideological litmus tests save one: "Mr. or Ms. Nominee, are you prepared to honor your oath to support the Constitution as written and not as you would like it to be, if we confirm you to this important office?" Any nominee who answers that question in the negative deserves to be rejected. Unfortunately, the Senate is today refusing a hearing or denying a vote to several nominees precisely because the current leadership knows that those nominees would honestly answer that question in the affirmative.

Mr. CHABOT. Mr. Gaziano.

STATEMENT OF TODD GAZIANO, SENIOR FELLOW IN LEGAL STUDIES AND DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION

Mr. GAZIANO. Good morning, Mr. Chairman and Members of the Subcommittee. I also thank you for this opportunity to testify.

I concur in Professor Eastman's recommendation in some of the ways that the Framers clearly allow. This is set forth in my testimony as well. But I want to focus just briefly on the obvious cause of the judicial vacancy crisis, which is the Senate's intentional refusal to act on many of the President's nominees, and then talk about the effect on the courts.

There are a lot of statistics, of course, thrown around in this debate, but let me just mention two that make the delay unavoidable. At the end of the last Congress, there were 67 judicial vacancies, and this is a time at the end of a Presidential term when normally vacancies increase. At the end of this Congress today, there are 77, an increase of 15 percent, during a period when traditionally the new President's judicial nominees are given great deference. And I should add President Bush set records in the number and timing of his nominations before the Senate.

The second fact is the average wait for court of appeals nominees, because even the statistic I alluded to before gives the Senate more credit than it deserves if you look at the court of appeals

[81] Statement to Administrative Oversight And The Courts Subcommittee (June 26, 2001) 2001 WL 21756493.

[82] Samuel Spencer, Speech at the North Carolina Ratification Convention, July 28, 1788, reprinted in 2 BAILYN, *supra* note 30 at 879.

nominees alone. My testimony compares the average wait of a court of appeals nominee for final Senate action for different Presidents, and it shows a very dramatic difference. Reagan, on the first set of nominees, first 11, was 35 days. It is 400 days now. But even that overestimates the speed of the Senate Judiciary Committee, because the first two nominees that they confirmed were President—appointed originally by President Clinton and were renominated as a goodwill gesture. If you eliminate those nominees, the average wait for the first 11 court of appeals nominees other than those two is 500 days.

Well, what is the proper standard? In 1998, Senator Leahy proposed one. He proposed a law that would have required the Senate to act on all judicial nominees then pending for 60 days or longer before the Senate recessed for 10 days or longer. Now, according to his own standard that he tried to get enacted into law, on August 2001 recess he had 10 court of appeals nominees that were pending as that recess approached. He could have at least gotten them out of his Committee that he is solely responsible for, and his fellow Members of the Committee. After he confirmed the two Clinton judges, he acted on none of them. A year later—365 days later—2002 August recess, of the 10 that were pending earlier, he had had hearings on 3, Committee votes on 2, none of which were reported to the full Senate, and the third that he had the hearing on, and we all know the shameful denial of the Committee vote that occurred earlier this week.

In my remaining time I want to focus on the impact of the courts because my written testimony talks about, I think, the harm to the rule of law that the Committee is doing when it does conduct a hearing. But the fact is when the vacancy rates increase substantially, as the Chairman explained in his opening statement, the Judicial Conference of the United States has to declare judicial emergencies. This allows certain emergency rules to come into play. These aren't attractive rules, but the courts really have no choice.

For example, it allows a circuit court to sit with only one active judge on a panel and up to two retired judges or visiting judges. It was one such panel in the ninth circuit that decided the infamous Pledge of Allegiance case. It is this type of procedure that skews the jurisprudence of the appellate courts. There are other emergency rules, like two judges can rule on emergency motions or decide summary dispositions.

The Federal judges that have written on this don't like this, and the academics have criticized it, but what is the alternative? It is either to deny justice by delaying these decisions further—one of the studies I cited in my written testimony describes the likely result of even in circuits where there isn't a judicial emergency rule, they decide more cases on their summary document. That is without oral argument, generally without an opinion. In that study Judge Jones, who I had the great privilege to work for, estimated that she spent less than 1 hour on each of the appeals for up to about half of her cases.

But what are the courts of appeals judges to do? But that is the best-case scenario for the situation in the courts. The worst-case scenario is there appears to be some great concern about judicial manipulation. Besides the matter that the Chairman alluded to,

there have been questions raised about the chief judges' ability to assign other cases in other circuits, to select the senior judges or retired judges and other visiting judges who might sit on particular matters.

But the sixth circuit case really is the most dramatic case because this was a nationally watched case challenging the racially discriminatory policies of the University of Michigan. Every other circuit in the Nation had struck down such policies that had decided them, and the facts set forth in Judge Boggs' dissent are quite remarkable. After manipulating the original panel that was hearing motions in the case, the chief judge also refused to circulate—didn't—whether he refused to do so or not is left for others to judge—he didn't circulate the petition for hearing by the entire court until after two judges appointed by Republicans had retired. Then the court accepted the case en banc. Then the court heard argument. Months later the court rendered a very split decision, 5–4, in conflict with every other circuit, during which time the U.S. Senate refused to have any hearings in the circuit, as the Chairman has said, with the highest vacancy rate.

Last week, Mr. Chairman, the students challenging the discriminatory policy brought an extraordinary writ in the U.S. Supreme Court asking the Supreme Court to take the remaining case away from the sixth circuit and decide both cases. I hope the Supreme Court does so because that is the only thing that is going to lift the cloud of that litigation. But it was the U.S. Senate that made that cloud possible. Either they intended it, or they just enabled it to happen through their intentional inaction. Neither possibility is very attractive. Thank you.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Gaziano follows:]

PREPARED STATEMENT OF TODD F. GAZIANO

Good morning Chairman Chabot and Members of the Subcommittee. Thank you for the opportunity to testify. The topic of today's hearing is certainly worthy of this Committee's attention. That you took the time to conduct this hearing so soon before you must recess for the election is further proof that the subject matter is important.

For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to Judge Edith H. Jones on the U.S. Fifth Circuit Court of Appeals. From 1995–97, I was the Chief Counsel of a subcommittee of the House Government Reform Committee, and much earlier than that, I was a professional staff member for U.S. Senator Jennings Randolph (D-WV). In addition, I have also served in the U.S. Department of Justice, Office of Legal Counsel (OLC), during separate periods in the Reagan, Bush, and Clinton Administrations. Among its duties during the period when I worked there, OLC helped vet potential judicial nominees for the President and served as informal counsel to Supreme Court nominees during their confirmation hearings. Thus, I have a past professional link to and a great interest in all three branches of the federal government, including both Houses of Congress.

I concur in the statement contained in the hearing title, "A Judiciary Diminished is Justice Denied: the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary." Nevertheless, the situation in the federal courts is uneven. There is not yet a crisis across-the-board, even though judicial emergencies have been declared for many courts. On close examination, the consequences of the high vacancy rate are partially ameliorated by the hard work of the judicial branch itself. That said, many federal appellate circuits have had such sustained high vacancy rates that it is straining the justice system mightily and has contributed to at least the perception of judicial manipulation in some very important cases.

The obvious cause of the vacancy crisis is the U.S. Senate's conscious refusal to act in a timely manner on many of the President's judicial nominations. The near complete breakdown in the judicial confirmation process as it relates to United States court of appeals nominees is worthy of special attention and concern. It is simply not possible to justify the stonewalling and other improper committee action on the grounds of payback or any other excuse. In 1997, when the vacancy rate on the appellate courts was less than half of what it is now, the current Chairman of the Senate Judiciary Committee, Patrick Leahy, said the situation was a "crisis" that interfered with the administration of justice. The current state is nothing less than a dramatic failure of the Senate's constitutional duty to provide its advice and consent to presidential appointments. It is also a violation of the Senate's obligation of comity to the executive and judicial branches of government, which is a vital aspect of the separation of powers.

The result is not just limited to shame on the Senate, however. The Senate's actions have begun to impair the judicial branch's ability to perform its constitutional functions. That impairment is limited at this point, but the impairment grows steadily as the period of sustained judicial vacancies is extended. The House Constitution Subcommittee is right to explore the implications of the Senate's failure.

THE CONSTITUTIONAL FRAMEWORK OF ANALYSIS

As this Subcommittee knows, the United States Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other [Principal] Officers of the United States, whose Appointments are not herein otherwise provided for." Art. II, § 2, cl. 2. That clause further provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." All federal judges below the Supreme Court are inferior in the judicial sense.

Lower court judges might also be "inferior Officers" for Appointments Clause purposes for whom Congress could vest the appointment in either the President or the Supreme Court alone. But Congress (or the Senate) has chosen to retain its power to pass on all judicial nominations. That is its prerogative. Yet, that choice underscores the Senate's duty, which extends to the other two branches of government and to the citizens who rely on the justice system, to provide its advice and consent in good faith and in a timely manner.

Scholars of the founding period have examined the historical record to illuminate some issues that I will only briefly address here. For example, there is evidence that the framers of the Constitution expected every presidential nominee to be voted on by the entire Senate and feared the arbitrary exercise of appointment power by a small committee. See Federalist Nos. 76–77. That seems clear, but I am unsure whether the text of the Appointments Clause, which confers the advice and consent role to the entire Senate, requires the Senate to act on every nomination. Those I respect have opined that the Constitution does not permit a committee of the Senate to block a nomination, but I am still dubious of that proposition. The Rules Clause that allows the Senate to make its own rules of procedure (Art. 1, § 5, cl. 2) may permit the entire Senate to delegate its agenda-setting function to a committee.

Others have interpreted the Senate Rules to require a full-Senate vote on presidential nominations regardless of what the relevant committee recommends. In my view, Senate Rule XXXI is ambiguous. It requires referral of all presidential nominations to "appropriate committees," and it further states that "the final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?'" Does that simply specify what the final question shall be on "every nomination" that is referred back to the full Senate or does it imply that the final question must be asked for "every nomination?" The Senate parliamentarians have given it the first construction.

I have not studied in depth either the constitutional question or the related question regarding the Senate rules in part because there is ultimately no remedy—apart from shame—for the violation of such a requirement. Assuming a disappointed nominee with standing filed a suit to force a full-Senate vote on his nomination, the courts would almost surely rule that the case presented a "political question" and decline to rule on the matter under its "political questions" doctrine. As for the tactic of urging shame, many other aspects of the confirmation process should have generated more shame. But it is still appropriate for citizens to add their voice to the chorus.

In that vein, the full Senate ought to vote on each one of the President's nominees to high office. The Senate should do so as a matter of prudence and in keeping with the comity that is required of each branch of government to the others, whether the

Constitution or the Senate's current rules requires such a vote or not. This is particularly true for those who have been nominated for a lifetime post in the judicial branch. The procedures the Senate adopts for such nominations affect more than just the business of the Senate; they also touch on the constitutional obligations of both other branches of government. The President has the obligation to nominate and appoint judges to fill up vacancies in the federal courts, and confirmed judges are the only individuals who can exercise the power conferred in Article III of the Constitution.

A full-Senate vote is even more appropriate where it is fairly clear that a majority of the Senate would vote to confirm the nominees, which is still the case with Charles Pickering and Pricilla Owen. Both Pickering and Owen received well-qualified ratings from the American Bar Association (ABA) review panel. In April 2001, Senator Leahy described a positive rating by the ABA as the "gold standard." Gold does not tarnish, so it is unclear why Senator Leahy and other Democrats on his committee have now abandoned their high regard for the ABA review panel.

No Republican senator announced opposition to either Pickering or Owen, and at least one senator from the majority announced support for both of them. Democratic senators who expressed their support for Pickering and Owen are not on the Judiciary Committee, but they sought the opportunity to vote on the nominations. Yet, the Senate Judiciary Committee refuses to forward these nominations to the full Senate—even with a negative recommendation, and Majority Leader Tom Daschle does nothing to bring the nominations to the Senate floor. Whether or not the Constitution or the Senate rules require such a full-Senate vote, it is still undemocratic for the current Senate leadership to block a presidential nomination from even being debated on the Senate floor. Ten senators are currently dictating the composition of the federal bench. Even a filibuster by a minority of the Senate would be less cowardly than the current practice.

THE CAUSE OF SUSTAINED HIGH VACANCIES IN THE FEDERAL COURTS

The most serious problem with the confirmation process is not the Senate Judiciary Committee's refusal to forward nominations that it has acted on to the full Senate, but its refusal to complete its action on most court of appeals nominations. Over the past several decades, the Senate sometimes has slowed down the confirmation process toward the end of a presidential term if the President and Senate majority are from different parties. Although some of President Clinton's judicial nominations were confirmed at the end of the 106th Congress, a slowdown in the last few months and the October adjournment of the 106th Congress contributed to a slightly higher than normal vacancy rate at the beginning of President George W. Bush's administration. (An even more severe slowdown took place at the end of President George H.W. Bush's administration.)

There is always some delay in the judicial nomination process at the start of a new presidential administration. The President possibly could have begun sending judicial nominations to the Senate in March of 2001, but the delayed transition period for President Bush pushed back the normal FBI background check and clearance process for cabinet and sub-cabinet nominees. Some of these officials also help vet potential judges. The pace of President Bush's judicial nominations since early May of 2001 was record setting. Within a year of announcing his first nominees, the President had sent more than 100 judicial nominations to the Senate. The ABA completed its review and supplied its recommendation within about three weeks of each nomination. With one exception, so far the ABA has rated every one of President Bush's nominees either qualified or well-qualified.

Two judges who had received an earlier appointment from President Bill Clinton and a sitting district judge who was acceptable to Louisiana's Democratic senators were promptly confirmed for life-time seats on the appellate courts. Almost all of the remaining nominations languished in the Senate without hearings even being scheduled. For months, the rate of confirmation of all federal judges barely kept pace with retirements. The pace of confirmation of federal district judges has picked up in the past year, but the confirmation process for court of appeals nominees has been set at a glacial pace.

1. The vacancy statistics and periods of unreasonable delay by the Senate

In the past, confirmation battles were waged over certain Supreme Court nominees and a very few lower court nominees. As mentioned above, the Senate sometimes slowed down the confirmation process toward the end of a presidential term, but this slowdown was the exception rather than the rule. What's dramatically different now is the systematic refusal to act on many of President Bush's *initial* nominees, particularly his appellate court nominees. The number of vacancies on the federal courts has actually increased by about fifteen percent since the end of the last

Congress. And during this Congress, most of President Bush's initial group of judicial nominees have been waiting for more than 17 months without so much as a hearing and a committee vote.

Based on the practice of many federal judges in announcing their retirement in advance and my review of recent confirmation statistics, I believe that a vacancy rate of about three to four percent represents the "full employment" level (to borrow a term from economists) for the federal judiciary. Yet, the Senate Judiciary Committee's inaction and the Senate's overall slow pace on most of the President's appellate court nominees have resulted in much higher vacancy rates. On the federal district courts, 50 of 665 judge seats (or 7.5%) are vacant. On the federal appellate courts, 27 of 179 judgeships (or 15.1%) are vacant.

Retired Judge (and former U.S. Senator) James Buckley concluded that "the Senate's willful failure to act upon a president's judicial nominees can only be described as an obstruction of justice." James L. Buckley, "Obstruction of Justice," *The Wall Street Journal,* June 13, 2002, A.16. Judge Buckley pointed out that, when he was a senator, nominees of the caliber nominated by President George W. Bush "would have been confirmed within weeks after their names had been submitted." Yet, it appears that a majority of President Bush's first eleven court of appeals nominees will not even have a committee vote 20 months after they were nominated.

Whether they all deserve to be confirmed or not (and the ABA thinks they are deserving), the Senate's conscious refusal to schedule hearings for most appellate court nominees is a shocking dereliction of duty. There may not be a committee vote by the end of this year for such distinguished professors, Supreme Court advocates, and judges as Deborah Cook, John Roberts, Jeff Sutton, Michael McConnell, Miguel Estrada, Terrence Boyle, and Timothy Tymkovich. That's inexcusable. Moreover, the two who did receive a hearing this fall (Michael McConnell and Miguel Estrada) may have to start the process all over again in 2003 if the full Senate does not vote on their nominations before the end of the current Congress.

With regard to court of appeals nominees, the delays are many times worse than at any recent time. These delays strain the judiciary and are unfair to individual nominees. To the extent that an intentionally prolonged delay can damage a law practice and keep individual nominees in professional and personal limbo, it becomes cruel. As explained further below, those who rely on the federal justice system may suffer as well.

The American Bar Association (ABA) has consistently urged the Senate to act promptly to confirm judicial nominees. In August of 2002, however, the ABA House of Delegates approved an especially strong statement that for the first time specifically identified the Senate Judiciary Committee as a "cause of blockage in the confirmation process" and urged the Committee to take prompt action on nominations. The ABA said that: "The notion that the Committee, by the simple expedient of refusing to hold timely hearings may avoid confirmation proceedings in the full Senate, is simply unacceptable to our notion of an appropriate and *constitutional* nomination process."

A persistent but low vacancy rate is unavoidable, reflecting a small number of vacancies that are promptly filled. Most federal judges are appointed at the prime of their professional career, or slightly later. Statutes provide comfortable benefits for federal judges who assume a semi-retirement status at age 65 (and after they have served 15 years). Most judges assume this "senior status" soon after they become eligible. Some judges announce their retirement date (colloquially, it is referred to as "going senior") with enough advance notice to allow the President time to nominate a replacement, but other judges do not. Serious illness, death, and other unanticipated events cause some vacancies to arise without notice. Accordingly, there will always be some vacancies in the federal courts.

In recent decades, when the confirmation process is running smoothly, the vacancy rate has dropped to around five percent. Chief Justice William Rehnquist has still admonished past Presidents and past Senates to act more expeditiously in nominating, confirming, and appointing judges to fill anticipated or actual vacancies. By comparison, a congressional seat is not left vacant for long before a special election is held (in the case of a House seat) or a temporary appointment is made (in the case of a Senate seat). When government officials are willing to spend a lot of time and money for a special election to fill 1/435th of the seats in the U.S. House of Representatives, Congress should make more of an effort to promptly fill numerous vacancies in the federal judiciary.

There were 67 judicial vacancies at the end of the 106th Congress and 77 now near the end of the 107th Congress, proving that the Senate is not even keeping pace with new retirements. Dueling statistics have unfortunately become commonplace in this debate, but there is one set of statistics that simply cannot be explained away. The stalling is undeniable when you consider the court of appeals

nominations by themselves. The chart below shows the average number of days the first eleven circuit court nominees had to wait for final Senate action, and the respective confirmation rate by President.

President	Average Number of Days Initial 11 Court of Appeals Nominees Waited For Final Senate Action	Court of Appeals Confirmation Rate
Reagan	39	100%
G.H.W. Bush	95	100%
Clinton	115	100%
G.W. Bush	approx. 400 (and counting)	27% (thus far)

If you eliminate the judges nominated by President George W. Bush who were first appointed by President Clinton, the picture looks even worse. Only one of the nine non-Clinton judges has been confirmed, a total of 11%. The average wait approaches 500 days for the remaining nine nominees, and is in excess of 500 days for eight of them. As this testimony is being prepared, seven of them have not had a committee vote and four have not even had a hearing.

Recently, Judge Buckley urged that the Senate rules be changed to allow the Judiciary Committee a few months to review the qualifications of judicial nominees and make its recommendation. Judge Buckley argued that the full Senate should vote after a few months whether or not the committee had acted. The current Chairman of the Senate Judiciary Committee, Patrick Leahy, proposed similar procedures just a few years earlier. Senator Leahy sponsored a bill in 1998 that would have required the Senate to act on all nominations pending for more than 60 days before it took a ten-day or longer recess. See S. 1906, 106th Congress.

Pursuant to his own legislative plan, Senator Leahy should at least have finished committee action on Miguel Estrada, Deborah Cook, John Roberts, Jeff Sutton, Michael McConnell, Dennis Shedd, Terrence Boyle, Timothy Tymkovich, Charles Pickering, and Priscilla Owen before the Senate took its August recess in 2001. Each of the nominees received a well-qualified rating from the ABA. Each of their nominations had been pending in his committee for over 60 days by then, most for over 80 days. But Leahy did not complete committee action on any of the above nominees by the August 2001 recess. Of those listed above, only Pickering, Owen, and Shedd were given hearings by the August 2002 recess-one year later. Many other court of appeals candidates nominated during the summer of 2001 have not had a committee hearing either.

Although the federal courts of appeals have an overall vacancy rate of over fifteen percent, some circuits have had a sustained vacancy rate of between thirty and fifty percent. The situation in the U.S. Sixth Circuit Court of Appeals is the most dramatic. During the Clinton Administration, the Chief Judge of the Sixth Circuit wrote to the Senate Judiciary Committee to express his deep concern regarding four vacancies in the sixteen-member court. He wrote that his court was "hurting badly" and that the situation was "rapidly deteriorating due to the fact that 25% of the judgeships are vacant."

The Sixth Circuit was operating for most of this past year with only half of its authorized judges. It still has seven vacant positions today, a 44% vacancy rate. President Bush made seven nominations to that court in 2001, two of whom were in the very first batch sent to the Senate on May 9, 2001. (President Bush sent an additional nomination a few months ago.) But Senator Leahy has held a hearing on just two of them, and only one has been confirmed. As explained below, the Senate's complete inaction on the circuit with the highest vacancy rate has caused some particular hardships and led to some questionable judicial practices.

2. The Senate Judiciary Committee is not providing its advice and consent in a manner consistent with the Constitution or the rule of law.

In addition to the intentionally prolonged delay in voting on most of the President's judicial nominations, several of the hearings that were conducted by the Senate Judiciary Committee were not only irrelevant to the merits of individual nominees, they instead attempted to lay the predicate for improper questioning at later confirmation hearings. In keeping with this agenda, hearings that were conducted for appellate court nominees during this Congress have been intentionally confrontational and focused on matters that are not properly the subject of such a hearing.

The few hearings that were conducted for appellate court nominees focused on a nominee's supposed political beliefs rather than his or her qualifications or philosophy of judging. Texas Supreme Court Justice Priscilla Owen was cross examined for seven hours in one hearing this past July, despite her obvious qualifications to

join the U.S. Fifth Circuit Court of Appeals. Justice Owen received a unanimous well-qualified rating from the ABA. Justice Owen's reelection to the Texas Supreme Court in 2000 was endorsed by every major newspaper in Texas, and Owen won the support of a record number of voters in Texas. Yet, on a party-line vote, the Senate Judiciary Committee voted in early September to block her confirmation based on supposed ideological concerns. Last month, committee Democrats also tried to discredit and bully Miguel Estrada over his purported personal ideological leanings.

This conduct is based on a fundamental misconception some senators have regarding the proper role of judges and our judicial system. There is a crucial difference between political ideology, which is a set of political beliefs or goals, and a nominee's judicial philosophy, which is a theory of, or approach to, judicial decisionmaking. Political beliefs ought to play no role in a judge's judicial philosophy.

The rule of law is premised on the following bedrock principle: law can be objectively determined and fairly applied to all no matter what judge or other official is in power. The rule of law is an ideal, and every ideal is imperfect. Yet, American school children learn that this is an essential characteristic of our system of government. Ours is a nation of laws and not men, we are told. This is another way of saying that the application of the law does not vary depending on who is in charge. The law can be, and for the most part is, applied consistently and fairly to all. Any deviation from this norm is to be condemned, not encouraged.

Accordingly, the founding generation believed that the federal judiciary would be "the least dangerous" branch—in large part because they understood that the "judiciary power" was fundamentally different than that exercised by the political branches. In *Federalist 78*, Hamilton argued that legal traditions would cabin a judge's role and mode of decisionmaking. A judge, he maintained, would exercise "judgement" not "will." His argument presupposed that such a distinction was intelligible and readily understood. That conception of law—that judges can objectively discern what the law is, rather than what it should be—was the governing orthodoxy for over 130 years.

Rule by the party embodies a different ideal—one practiced by many communist nations. In that system, all judicial rulings are supposed to conform to the then current dictates, plans, agenda, or beliefs of the governing party. What is desired more than anything else in a judge or other government official is the proper political ideology, because that best informs all other action. Since there is thought to be no objective truth, the correctness of a ruling may change if the party line changes. Generally, only long-time party members who have proven their personal allegiance to the party's teachings are entrusted with high government power.

Antecedents of this thinking in America can be found in post-civil war nihilism, but the legal realists of the 1920s were the first to significantly undermine the rule of law. Legal realism, mingled with strains of pragmatism, relativism, and deconstructionist thought, captured the legal academy between the 1920s and 1960s. It began to bear substantial fruit in the courts thereafter. It is an oversimplification, but the orthodox thought of this era—running at least through the mid-1980s—is that law is just politics by another name.

This development is profoundly misguided and destructive. Yet, it is not surprising that its adherents increasingly urged the courts to become instruments of social change in overtly political ways. The courts' rulings ending government discrimination were (and are) necessary, but the tools the courts developed to fight the massive resistance to civil rights were also invoked to promote more amorphous social goals without clear constitutional foundations.

For a judge, such a seductive request is difficult to resist, even more so if the dominant legal culture has eliminated the traditional moral constraints on judging. With differences of style rather than content, the courts began to assume the role of another political branch to which dissatisfied citizens could turn to have their personal preferences, their will, enacted into law.

In this climate, it is easy to see why judicial confirmation battles might develop for Supreme Court justices. Unfortunately, the confirmation battles themselves further politicize the courts and reinforce the caustic notion that the courts are little more than a political plum. This notion was expressly stated by Abner Mikva and many liberal academics, who argue that Bush's Presidency is illegitimate. Still brooding about the correct Supreme Court ruling in *Bush* v. *Gore*, Mikva and others who should know better have urged the Senate to confirm no Bush nominee to the Supreme Court and encourage all means of thwarting his legitimate nominees to the appellate courts.

Hearings conducted by Senator Charles Schumer last fall on "whether ideology matters" in judicial selection and more recently in connection with the D.C. Circuit Court are an outgrowth of that dangerous thinking. Perhaps ideology matters a great deal for a nominee or senator who believes that there is no meaningful dif-

ference between law and politics. But that belief would demonstrate to me that the nominee has an unacceptable judicial philosophy. No further inquiry into the nominee's political beliefs is necessary. Testimony offered by President Clinton's former Counsel, Lloyd Cutler, and President George H.W. Bush's former Counsel, C. Boyden Gray, urged the Senate not to focus on political ideology in judicial selection. They both also agreed that extensive partisan inquiry is harmful to an independent judiciary.

A nominee with an appropriate judicial philosophy is one truly dedicated to the rule of law. Senators should be free to probe a nominee's theory of judging, *i.e.*, the methodology he would use when deciding cases, as long as the question does not ask the nominee to take a position on a matter that may come before him. Thus, I do not think that it is always enough for a nominee for a lower court judgeship to simply pledge that he will follow the law as set forth by the higher courts without explaining what that means. A record of scholarship or prior opinions, or a discussion of venerable old cases might help the committee to determine if the nominee appreciates what the rule of law requires.

I also think nominees reasonably could be asked to explain their general theory of various clauses of the Constitution. A competent grasp of the Constitution is necessary for any judge, and a discussion about its provisions might also be a good window on the nominee's approach to law and legal reasoning. Once again, however, senators must be careful not to ask the nominee about a particular subject matter or legal issue that might come before the nominee. Not only does the Code of Judicial Ethics require current and prospective judges to refuse to pledge how they might rule in the future, the American people want independent judges who have not committed themselves to a particular ruling.

Unfortunately, the argument that political ideology should not matter, and that extensive inquiry about it is destructive of an independent judiciary, is based on an understanding of law (i.e., the rule of law) that many senators seem to reject. The prevailing attitude is that the ideological stakes are high, and to the victor go the spoils. Modern-day legal realists, and their judicial activist advisers, desperately want judges who will impose a liberal or progressive will, not law. This is how the political branches were designed to operate, but not the courts.

A senatorial litmus test on an open or evolving legal issue is even more destructive to an independent judiciary than an improper inquiry about the nominee's general political beliefs. Senators who admit that they are applying such a single-issue litmus test know this full well. Their clear purpose is to eliminate any shred of judicial independence with regard to some controversial legal issue like abortion that is largely settled in the law but still permits some limited room for legislative action. Urged on by special interest groups that are influential in their states, these senators want only activist nominees who will strike down legislation that is permissible under Supreme Court cases, such as parental notification statutes with judicial bypass mechanisms.

These same senators express strong opposition to recent Supreme Court decisions (and lower court judges who would follow them) that enforce any limit in the Constitution on Congress's power to legislate. The senators denounce decisions interfering with any law they sponsored on the ground that it was passed with majority support. But requiring parents to be notified when their minor child seeks an abortion (absent special circumstances) is supported by an overwhelming majority of Americans. The difference, which educated senators should know, is that judges sometimes are required to enforce limits on legislative action and sometimes they are forbidden to do so, according to the Constitution. Lower court judges must follow the rulings of the Supreme Court on these matters, but some liberal senators who pretend to stand on principle really just want progressive outcomes: they want judges to ignore liberal legislation that exceeds Congress's authority and strike down other legislation that is permissible but that they, and their interest group supporters, simply don't like.

In contrast, modern-day federalists sincerely want judges who will fight the temptation to act on political biases, and instead, adhere to a mode of judging that minimizes such influences, including careful adherence to the text and the intent of those who enacted the governing text. Some senators and liberal activists may actually believe such a code cannot be followed. To them, nominees who pledge fidelity to the rule of law are, at best, dupes who will not advance the progressive cause. At worse, such nominees are seen as dissemblers who will become "conservative judicial activists" on the court.

Senator Schumer is at least honest about his view and objectives, and there is something to be said for that. If I were a nominee, I think I would probably rather be bullied by senators over my supposed political beliefs than have my character assassinated over some trumped-up offense—as was the case with Brooks Smith and

Charles Pickering. Nevertheless, both practices are destructive to the individual nominees, to the confirmation process, and to the rule of law. And both lines of inquiry fuel the tit-for-tat mentality that helps keep the confirmation wars alive.

A significant change in our collective view of the proper role of the courts is desperately needed (which should also lead to contraction in the judiciary's improper exercise of power). As difficult as that may be to foster, the federalist view is steadily gaining ground again and hearings like this one will help educate the general public about what is at stake. Men of good faith on the right and left have spoken out that ideology should not matter.

Even if it is not possible to alter senators' understanding of the proper role of the courts, the confirmation process still needs to be fixed somehow, perhaps as the result of a political truce. In my view, the President has acted with great restraint so far, perhaps too much restraint. He has a lot more tools at his disposal that he has not employed to bring attention to the judicial vacancy crisis. He could communicate to the Senate that he will call the Senate back into special session if they do not act on a sufficient number of his nominees by its next recess. Indeed, I think he should have delivered such a message last fall, when the Senate's plan of obstruction was already clear.

In addition, the President could fill the longest-standing vacancies with recess appointments under the Recess Appointments Clause, which appointments last until the end of the Senate's "next Session." See Art. II, § 2, cl. 3. A President must not abuse his power under that clause, but he needs to take some action to help the courts and change the incentives the Senate faces in doing nothing. I would advise the President to give recess appointments to qualified individuals who are not then nominated for the life-time position. This would allow the Senate to displace the recess appointee at any time it acts to confirm a regular appointee. Such action would not interfere with the Senate's deliberations, but it would undermine the liberal activists who urge the Senate majority to inaction.

If nothing changes in the confirmation process, the legal realists' understanding may become more and more of a self-fulfilling prophesy: only those who behave as political ideologues will be appointed. These are the seeds the Senate majority is sowing now.

EFFECTS OF PROLONGED JUDICIAL VACANCIES ON THE COURTS AND THE ADMINISTRATION OF JUSTICE

The sustained number of judicial vacancies, particularly in the federal appellate courts, is straining the judiciary as never before. In short, the political process and partisan delays risk substantial harm to our justice system.

Although the effect of prolonged judicial vacancies on the courts and the administration of justice is obviously related, it is possible in theory for the remaining judges and their staffs to simply work much harder and more efficiently in an attempt to ensure that the administration of justice is not affected by the Senate's bad faith. This is certainly what the courts have attempted to do. Their level of success is hard to evaluate for some reasons that are explained below, but also because there is a qualitative aspect of administration of justice that is exceedingly difficult to measure.

That said, the federal judiciary is a thoroughly professional institution which is supervised by the very able Chief Justice of the United States. It is aided by many career staff attorneys, judicial law clerks, and administrative personnel. The judicial system can adequately handle a relatively low number of vacancies on a circuit court as well as a district court vacancy in a judicial district where there are many other district judges. (A district court vacancy in a one- or two-judge judicial district, however, presents severe problems.) Likewise, the larger district and circuit courts can adequately handle a short period when there are more than a few vacancies.

When vacancy rates increase in a given court, the Judicial Conference of the United States may declare a judicial emergency for that court (based on guidelines it has developed). This has been done increasingly over the past several years. Nearly 40% of the current judicial vacancies have been classified by the Judicial Conference of the United States as "judicial emergencies." Pursuant to court rules in effect in many judicial districts or circuits, this permits certain emergency rules to operate within that court.

For example, an appellate court must generally decide cases in three-judge panels. Most appellate courts sit to hear oral argument once per month for about four days in randomly-shuffled three judge panels. A sixteen member court with only nine judges (as is the case in the Sixth Circuit, which covers all of Michigan, Ohio, Kentucky, and Tennessee) can form only three panels per month instead of five if it sticks to its active judges alone. Court rules normally in effect allow panels to be

formed with two active members of the court and one senior or visiting judge—assuming the court can find visiting and senior judges willing to regularly take on that burden. Emergency rules may allow a panel to be formed with only one active judge and two senior or visiting judges.

The Ninth Circuit panel that decided the "Pledge of Allegiance Case," *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), was composed of one active judge and two senior judges. Circuit rules may also allow the senior or visiting judge that sat on the original panel to sit on the "en banc" panel if the entire court reconsiders the decision. In the Ninth Circuit, where the entire court does not sit on "en banc" rehearing panels, this may further skew the jurisprudence of the court.

Another change the emergency rules may allow is for two judges to rule on motions panels and certain types of summary dispositions if they both agree on the result. At first blush, it may not be clear why this presents a problem since two judges can overrule a third judge who might be assigned in the normal course of events. But there is a reason why three judges are on normal motions and summary disposition panels. The third judge may spot an issue that the first two judges may not notice, and he may convince one of them to change his mind or send the case to the oral argument calendar. In the Fifth Circuit, where I served as a law clerk, any one judge on a summary disposition "screening" panel could send the case to the oral argument docket. A third judge obviously increases the likelihood of that happening.

It is impossible to quantify how often the emergency rules might affect the outcome or handling of a case in the federal courts, but several prominent federal judges are concerned about interference with their normal procedures. Chief Judge Douglas Ginsburg of the D.C. Circuit Court of Appeals explained a few months ago that the court's "ability to manage [its] workload in a timely fashion will be seriously compromised" if it has to operate with only eight of its twelve members for much longer. Chief Judge Ginsburg then catalogued the reduced number of oral argument cases that will be heard in the circuit in the 2002–2003 term and the change in composition and duration of emergency panels. He concluded his remarks with a somber note: "[I]t is clear that the delay [in confirmations] has begun to jeopardize the administration of justice in this Circuit." See Chief Judge Ginsburg's circuit conference remarks reprinted in *The Circuit Voice* (Summer 2002), found on the D.C. Circuit's website, http://www.cadc.uscourts.gov/.

The Circuit Judge I had the great pleasure to serve early in my career, Edith Jones, recently published a novel type of workload study in the *Texas Tech Law Review* that provides some additional and interesting insights. *See* Hon. Edith H. Jones, *A Snapshot of A Fifth Circuit Judge's Work: Boutique Justice*, 33 Tex. Tech L. Rev. 529 (2002). Judge Jones's study is not intended to catalogue all of the work she did during the study period of three months, because she excludes many categories of work she performs. For this reason, it is not intended to show the total number of hours she worked—as a lawyer does in private practice. Instead, Judge Jones set out to categorize the type of cases she handled during the study period, note the number of cases in each category and relative time she spent on each type (excluding some periods of time such as oral argument). She also explained the methods her circuit has developed to expedite the relatively repetitious or easy cases so that the court could stay on top of its docket.

To her great credit, Judge Jones does not complain about her workload (which she downplays in her article despite the tremendously long hours I know she works), and she believes her court can manage fairly well with at least fifteen active judges on the seventeen-member court. Yet, her article still highlights some problems with the few vacancies on her court and suggests graver problems for other circuits.

For example, Judge Jones confirmed that the average number of oral argument cases heard by each judge in a year has not varied significantly in over fifteen years. That number is approximately 140. These are the hardest cases, or at least those where the judges believe that a lawyer's argument may be critical. Judge Jones confirms that the "lawyers' appearance has been critical to our decision-making" in a significant number of the oral argument cases. *Id.* at 536. Senior judges are used whenever possible in the Fifth Circuit already. So, even with only two vacancies on the court, the total number of cases that can be scheduled for oral argument is substantially decreased. A fair number of those cases decided without oral argument might have been resolved differently.

Judge Jones explained further that "[w]hat has increased phenomenally during [her] tenure is the volume of the summary calendar." *Id.* at 538. The circuit has come up with some novel and interesting ways of expediting these cases that are determined to be less complicated, legally or factually. One method used in several circuits is for the circuit staff attorneys to prepare memos on the cases that appear to them to be routine. Those cases are distributed randomly to different "screening"

panels. If the first judge on the distribution list agrees that it is a routine case, she drafts an opinion and presents it to the other judges in turn. The two other judges on that screening panel do the same thing with their third of cases. Any judge on the panel may review the entire record in the case and send it to the oral argument calendar, but that happens with few cases. No doubt this is principally because the circuit staff attorneys and first reviewing judge got it right, but it is probably also due in part to the fact that the cases placed on the screening panels receive less attention.

Given that the average number of oral argument cases per judge is fixed and the volume on the summary calendar has increased phenomenally, that means an increasing percentage of the circuit's caseload is decided on the summary calendar. Academics have criticized many of the case handling techniques like the one described above. Although I believe the academic criticism is largely uniformed, it is hard to deny that less attention is paid to these cases. (We all must prioritize our work, except perhaps in academia. Would the academics prefer the courts to fall further and further behind on their dockets?) Yet, the only way for a circuit to handle the extra workload that additional vacancies pose is to increase even further the percentage of cases disposed of on the summary calendar.

Judge Jones acknowledges this point with a warning:

> [T]he addition or subtraction of a single screening panel affects a large percentage redistribution of the summary calendar among the active judges. Such a redistribution may occur, for good or ill, as a group of Fifth Circuit judges begins to take senior status in the next few years. If replacements are not speedily confirmed, the per-active-judge burden of the summary calendar will escalate and begin seriously to impinge on the time necessary to address the oral argument docket cases. *Id.*

The situation in other circuits has already passed the point at which oral arguments are canceled and judges must spend less time on those that are held. The D.C. Circuit has a 33% vacancy rate. The Ninth Circuit has an 18% vacancy rate. And the Sixth Circuit has the highest vacancy rate at 44%.

There are approximately 55,000 appeals filed in federal courts of appeals per year, and the circuit courts generally do not have the discretion to refuse to take such cases. Fifteen percent of that total is 8,250. Who will handle those appeals? How will the work get done? Through the increased use of the summary calendar and emergency procedures, a court may attempt to keep up with its normal flow of cases. But sustained periods of high vacancy on some courts overwhelm even the most diligent courts.

One disturbing possibility is that the emergency rules in place in some circuits also permit judicial manipulation of the docket. The emergency rules may bypass the normal random assignment of judges, and often allow the chief judge to assign visiting and senior judges to panels of his choosing. The rules also increase the chance that cases will not be assigned randomly either. There have been questions raised in several circuits regarding possible manipulation of the rules. Even the appearance of judicial manipulation is disturbing.

One judge in the Sixth Circuit took the extraordinary step of questioning the timing of the en banc hearing of the two University of Michigan racial preference cases in an appendix to his dissent in the first of the cases to be decided. *See Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002) (dissent by Boggs, J.). Judge Danny Boggs's criticism has been echoed by several newspapers and commentators. In short, the chief judge waited before he circulated the en banc request until two judges who were appointed by Republicans had taken senior status and would be ineligible to sit with the full court. With the circuit court at half its normal complement of judges, the case was then scheduled and heard. It was decided months later while the Senate Judiciary Committee refused to schedule any hearings for the judges who had been nominated to fill the vacancies. See, e.g., Editorial, *The Wall Street Journal*, May 17, 2002, A.10; Thomas Bray, "Media see no evil at 6th Circuit," *The Detroit News*, May 26, 2002, A.17. Judge Boggs noted other irregularities in the handling of the case as well.

Part of the Sixth Circuit controversy is related to the fact that the court reached a result in the *Grutter* case in conflict with every other circuit. In an extraordinary writ, the students who are challenging the racially preferential admissions policy asked the Supreme Court last week to take the remaining case, *Gratz* v. *Bollinger*, away from the Sixth Circuit and decide both cases without further action by that court. Hopefully, the Supreme Court will hear the two cases and remove the cloud that hangs over the proceedings in the Sixth Circuit. But the Senate's inaction with regard to the Sixth Circuit has allowed such a cloud to develop. At its worst, the Senate intended this result. At best, the Senate has enabled such a controversy to

arise through its sloth or callous refusal to act. Neither indictment is particularly attractive.

CONCLUSION

The judicial confirmation process is at a new and disturbing low. Ten Democrats on the Senate Judiciary Committee and the current Senate leadership are holding numerous judicial nominees hostage in an attempt to undue the consequences of the last presidential election, and apparently, in an attempt to hold vacancies open for liberal judicial activists.

The immediate harm to the administration of justice is hard to quantify, but it is real, and evidence of it is growing as the judicial confirmation delays stretch on. The long-term harm from the politicized confirmation process to the courts as an institution is even more grave. If the rule of law is to survive in its traditional form, the judicial confirmation process must be radically changed.

Mr. CHABOT. Mr. Neas.

STATEMENT OF RALPH NEAS, PRESIDENT, PEOPLE FOR THE AMERICAN WAY AND PEOPLE FOR THE AMERICAN WAY FOUNDATION

Mr. NEAS. Good morning, Mr. Chairman and Members of the Committee. On behalf of the 600,000 members and supporters of People for the American Way, I thank you for the opportunity to testify today on the subject of vacancies in the Federal courts.

It is great to be back in this room. When I was with the Leadership Conference on Civil Rights, I was part of an effort led by the bipartisan congressional majorities to strengthen all the major civil rights laws from 1981 to 1993, so I have a lot of great memories from here.

Mr. Chairman, I believe the future of the Federal judiciary is the most important domestic issue facing the Congress, the Presidency and the courts and the Nation. Indeed, judges confirmed today will be interpreting the Constitution and the laws of the land for decades to come, and what they decide will have a profound impact on the daily lives of all Americans, their children and grandchildren.

With so much at stake, we urgently need a national debate. Thank you for contributing to it. It is heartening to us, People for the American Way, that the Senate Judiciary Committee is taking its constitutional responsibility seriously in conducting a meaningful review of a number of President Bush's nominees. At the same time, the Senate has made significant progress in addressing the extraordinary number of vacancies inherited from the previous Republican-controlled Senate.

The American people would be appalled if they knew that the result of the unprecedented obstructionism of right-wing Senators, 35 percent of President Clinton's circuit nominees were blocked from 1995 to 2001. Thirty-five percent. Forty-five percent of them failed to receive a vote in the Congress during which they were nominated. Many did not even get a hearing. As a result of the right-wing blockade, judicial vacancies skyrocketed from 65 in 1995 to 111 in 2001.

There is no question ultraconservative groups and politicians hope that a Republican President would take advantage of all those vacancies their Senate allies perpetuated by filling them with right-wing ideologues. Currently, Republican-nominated judges hold a majority on 7 of the 13 circuit courts of appeals, three are

majority Democratic appointments, and three are divided. If all of President Bush's current nominees are approved, such judges will make up a majority on 10 circuit courts. By the end of 2004, Republican-appointed judges could make up a majority in every one of the 13 circuit courts of appeals. I am not sure that has ever happened in the history of the United States. With these judges, right-wing ideologues, the future of many of our civil rights and constitutional freedoms would be in serious jeopardy.

It would be understandable for Senators Leahy and Daschle to treat judicial nominees the way nominees were treated from 1995 to 2001. Instead, they have moved promptly and responsibly to fill judicial vacancies since taking control of the Senate. It is terribly unfair and hypocritical for the very same people who helped cause the delay, and who told us that vacancies were not a problem just a few years ago to now charge Senators Daschle and Leahy with improper delay and then use these charges to try to stampede nominations through the Senate.

The charges are also totally inaccurate. In the first hearing during which Democrats controlled the Senate beginning in July 2001, the Senate confirmed 59 nominations to the Federal judiciary. These 59 nominations and confirmations are nearly four times the number confirmed during the entire first year of the first Bush nomination and more than twice the number confirmed during the first year of the Clinton administration.

This pace is significantly ahead of what occurred when Republican Senators deliberately stalled the process from 1995 to 2000. For example, more judges were confirmed by the Senate in the first year of Democratic control than were confirmed in all of 1995, 1996, 1997, 1999 and 2000. As of yesterday, 80 nominees have been confirmed, and 17 more have been approved by the Judiciary Committee. During the Reagan, Bush and Clinton Presidencies, four nominees on the average were confirmed each month. By contrast, of the first 15 months of Senator Leahy's chairmanship, the average has been five to six confirmations per month. At this rate there will be more judges confirmed during these 4 years than any comparable 4-year period in our history.

Perhaps we should consider slowing down a bit and reassessing things. The current pace of appellate court nominations exceeds the confirmation rate of the Senate when it was under Republican control, contradicting right-wing claims. The Senate has thus far confirmed 14 appellate court nominations, 11 of which were confirmed during the first year of Democratic control. In comparison, Republicans averaged less than eight confirmations per year during 1995 to 2001. Because of the delay in refusing to vote in President Clinton's nominations during that period, the total number of vacancies on the courts of appeals more than doubled from 1995 to 2001, growing from 16 to 33. That is a remarkable statistic, 16 to 33.

In the last year, despite new vacancies, the total number of appellate court vacancies has decreased to 27. In fact, if Republicans had moved at the same pace that the Democratic Senate has moved since July of 2001, there would now only be six vacancies on the courts of appeal.

Mr. Chairman, no Presidential nominee should be guaranteed confirmation to a lifetime seat on the Federal bench.

Mr. Chairman, I am going to insert, if I may, for the record some of the standards and history and some of the history that the others discussed and just conclude.

Mr. CHABOT. Without objection, those will be accepted.

Mr. NEAS. The current unprecedented situation calls for an unprecedented bipartisan solution. The President should reject the demands of the far right and submit more moderate nominees who are truly qualified for the Federal bench. This should include genuine consultation with Senators of both parties both before and after nominations are made. Consensus and compromise should be the goals. This is the way more progress can be responsibly made to further reduce the number of vacancies on the courts.

The debate over the Federal judiciary is part of an epic battle over the role of the Federal Government. The two-prong strategy of right-wing Republicans and, quite frankly, the Bush administration is simple, but breathtakingly radical.

First, enacting affirmative tax cuts will eliminate $6 trillion in revenue over the next 20 years. That will, in effect, starve the Federal Government so it will be unable to fund many vital Government functions performed since the New Deal. The second prong is to pack the Federal judiciary with right-wing ideologues whose judicial philosophy would turn back the clock in civil rights, environmental protections, religious liberty, reproductive rights and privacy, and so much more. Take away the money. And then take away legal rights that have been part of our constitutional framework for 65 years. We do indeed need a national debate before the American people wake up one morning and discover that fundamental rights and liberties have vanished overnight.

Thank you, Mr. Chairman, for the opportunity to testify.

Mr. CHABOT. Thank you, Mr. Neas.

[The prepared statement of Mr. Neas follows:]

PREPARED STATEMENT OF RALPH G. NEAS

Good morning, Mr. Chairman and members of the Committee. On behalf of the 600,000 members and supporters of People For the American Way, I thank you for the opportunity to testify today on the subject of vacancies and the federal courts. The federal judiciary should be a topic of great interest and debate not only among Senators—who play a crucial constitutional role in reviewing nominees under consideration for lifetime appointments to federal judgeships—but also among members of the House and the American people. We need a national debate.

It is impossible to overstate the importance of the federal judiciary to our nation's future. Judges confirmed today will be setting precedents and interpreting the laws of the land for decades to come. The Senate Judiciary Committee has conducted robust, meaningful review and debates on a number of President Bush's nominees. That is a vitally important task. In addition, Senate Judiciary Committee Chairman Patrick Leahy and Senate Majority Leader Tom Daschle have made significant progress in reducing the large and growing backlog of vacancies they inherited from the previous Republican-controlled Senate.

The Supreme Court and other federal courts exercise enormous power in deciding cases on such issues as civil rights, the right to privacy, reproductive freedom, women's rights, religious liberty, consumer and worker protection, and the environment. Because most cases that raise fundamental constitutional questions are now decided by slim majorities, more than 100 Supreme Court precedents could be overturned with just one or two more appointments who share the judicial philosophy of Justices Antonin Scalia and Clarence Thomas. It has now been more than eight years since the most recent Supreme Court appointment, the longest interval since the administration of James Monroe 179 years ago.

The vast majority of federal cases never make it to the Supreme Court, but are decided by lower federal courts. These lower federal courts are extremely important,

and every year decide thousands of cases that affect our lives. In 2001, for example, the federal appellate courts decided more than 28,000 cases, many of which were important rulings on privacy, the environment, and human and civil rights. This is in sharp contrast to the United States Supreme Court, which has reviewed fewer than 100 cases in recent terms. In effect, many appeals court rulings stand as the final word governing the law in their regions.

As a result of right-wing Senators' unprecedented obstructionism, 35 percent of President Clinton's appellate court nominees were blocked from 1995–2000; 45 percent failed to receive a vote in the Congress during which they were nominated. Many did not even get a hearing. Right-wing groups hope the White House will take advantage of the vacancies their Senate allies perpetuated by filling them with right-wing ideologues. Republican-nominated judges currently hold a majority on seven of the 13 circuit courts of appeal; three have a majority of Democratic nominees and three are divided. If all President Bush's current nominees are approved, such judges will make up a majority on 10 circuit courts. And by the end of 2004, Republican-appointed judges could make up a majority on every one of the 13 circuit courts of appeals.

The result is that we are in an unprecedented situation in which the future of many of our civil rights and constitutional freedoms is literally at risk.

In our system of checks and balances, the Senate has a co-equal role with the President in appointing federal judges, since it must provide its "advice and consent" before any nominee becomes a judge. It is imperative that the Senate carries out this constitutional role in a careful, thorough and diligent manner. Judicial nominees—who are confirmed for lifetime appointments—must be carefully scrutinized.

- *No nominee is presumptively entitled to confirmation to a lifetime appointment to any federal court.* Particularly for the courts of appeals and the Supreme Court, a nominee bears the burden of demonstrating that he or she meets the appropriate qualifications, which should include a demonstrated commitment to civil rights and individual liberties, and a clear respect for Congress' proper constitutional role in protecting constitutional and civil rights and the health and safety of all Americans. More than 200 law professors have written to the Senate, setting forth these qualifications.
- *In carrying out its role, the Senate must ensure that judicial nominees are subject to the highest standard of scrutiny.* The decisions of judges last long after they and the President who appointed them have retired. The American people must be assured that judges who are given the solemn constitutional responsibility of protecting their rights and upholding the Constitution are unequivocally committed to justice and equality for all.
- *Each nominee's record must be examined carefully, including unpublished opinions and other information that may not be readily available.* By its very nature, this sometimes is a time consuming process but one that is essential to the Senate's obligation to evaluate the full record of a nominee. The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation.
- *The Senate should reject far right court-packing efforts, and should withhold its consent from right-wing nominees who do not demonstrate a commitment to civil rights and liberties.* Senators should take a clear and unequivocal stand, including discussing openly the potential impact of right-wing domination of the federal courts and the importance of opposing nominees whose lifetime appointments would threaten America's rights and liberties. More moderate, mainstream nominees who reflect genuine bipartisan consultation should receive priority in processing.

Since taking control of the U.S. Senate and the Senate Judiciary Committee in July 2001, Senators Daschle and Leahy have moved promptly and responsibly to fill judicial vacancies. It is wrong for the very same people who helped cause the delay and who told us that vacancies were not a problem a few years ago to now charge Daschle and Leahy with improper delay and then use these charges to try to stampede nominations through the Senate.

In the first year during which Democrats controlled the Senate, beginning in July 2001, the Senate confirmed 59 nominations to the federal judiciary. These 59 confirmations are nearly four times the number confirmed during the entire first year of the first Bush administration (1989), and more than twice the number confirmed during the first year of the Clinton administration (1993). This pace is significantly ahead of what occurred when Republican Senators deliberately delayed the process from 1995 to 2000. For example, more Republican-nominated judges were confirmed

in the first year of Democratic control than were confirmed in all of 1995, 1996, 1997, 1999, or 2000.

The total number of vacancies, which climbed to 110 during Republican control, will be down to 60 once the nominees approved by the Senate Judiciary Committee this week get a final Senate vote. And the president has not even submitted nominees for half of these vacancies.

The current pace of appellate court confirmations exceeds the confirmation rate of the Senate when it was under Republican control, contradicting right-wing claims. The Senate has thus far confirmed 14 appellate court nominations, 11 of which were confirmed during the first year of Democratic control. In comparison, Republicans averaged less than 8 confirmations per year between 1995 and 2000. Because of the delay and refusal to vote on President Clinton's nominations during that period, the total number of vacancies on the courts of appeals more than doubled from 1995 to 2001, growing from 16 to 33. In the last year, despite several new vacancies, the total number of appellate court vacancies has decreased to 27. In fact, if Republicans had moved at the same pace that the Democratic Senate has moved since July 2001, there would now be only 6 vacancies on the courts of appeal. This flatly contradicts accusations that no progress has been made on appellate court nominees—accusations leveled by many of the same right-wing Senators and advocates who helped create and perpetuate the large numbers of appellate court vacancies.

The current situation calls for an unprecedented bipartisan solution. The President should reject the demands of the far right, and submit more moderate nominees who are truly qualified for the federal bench. This should include genuine consultation with Senators of both parties both before and after nominations are made. This is the way that more progress can responsibly be made in further reducing the number of vacancies on the federal courts.

Mr. CHABOT. And I have to comment that I think you set a record for the number of times in this Committee that the terms "far right" and "right-wing" have been injected in testimony.

Mr. NEAS. I learned a lot from the right about repeating the message.

Mr. CHABOT. Thank you.

Ms. Daly, you are recognized for 5 minutes.

STATEMENT OF KAY DALY, COMMUNICATIONS DIRECTOR AND SPOKESPERSON, COALITION FOR A FAIR JUDICIARY

Ms. DALY. Thank you, Mr. Chairman and Members of the Subcommittee, for inviting me to testify today on the cause and effect of the vacancy crisis in the judiciary. First let me state for the record that I am not an attorney. While that might be an applause line in many corners of this country, I find myself outnumbered in this hearing today by attorneys at the top of their profession. Please be gentle with me. I am a stay-at-home mom with a beautiful 18-month-old baby boy and another child on the way. I find the time to help the coalition because as a mother I am deeply concerned for our generation and the ones that follow about the independence of our Federal judiciary and the direction that the confirmation process is currently taking in the United States Senate.

This judiciary is not immune to injury. The public does not distinguish between fact and fiction once fabrication reaches critical mass. Instead the public just discounts everyone involved. Most Americans might not know the difference between a Federal court and tennis court, but they do know, thanks to the ninth circuit ruling on the Pledge decision, that something is terribly wrong with our Federal judiciary.

Effectively the Senate and judicial confirmation process have been hijacked by a growing number of leftist groups. The modus operandi is simple: A consortium of left wing groups led by People

for the American Way meet regularly to plot against targeted nominees. Research is conducted with an eye to gotcha politics. Funding pours in from unions, Hollywood, trial lawyers and, curiously, media outlets. More research staff is hired.

Vicious reports on judicial nominees laced with message points are formulated and distributed. As if by magic, these vitriolic message points bounce from the various Websites of these organizations to echo in the marathon questioning of judicial nominees by robotic Democrats during confirmation hearings to finally land in the pages of the *New York Times*. They look for anything, anything at all, even including a membership in a men's only fly-fishing club that they can use to charge a nominee with being racist, sexist, bigoted, homophobic or any variation of that ultimate moniker, conservative.

Then they trot out their favorite purported legal ethicist to criticize the supposed lack of ethics for the nominee, criticizing the nominee, for example, because he liked to fish at a lake where his grandfather used to take him. Meanwhile, because of Senate traditions and customs, the nominee is unable to speak out to defend himself except at confirmation hearings, which are delayed for months and sometimes years, to permit the drumbeat of ethics criticism to continue in the media unobstructed.

If the end results weren't so catastrophic to our judicial system, this well-oiled machine would be a thing of beauty. It is tough to perceive objectivity and an emphasis, though, who was photographed on top of a car at Northwestern University in a protest as the leader of the radical Students for a Democratic Society surrounded by police officers, and yet this describes a favorite ethicist used by left-wing organizations. Accusations from these liberal groups are bent not on disclosing the truth, but ensuring the preservation of an activist agenda by manipulating the composition of the most powerful branch of the Federal Government. Meanwhile a beleaguered nominee and his family must endure the excruciating ordeal of watching helplessly as their family name is dragged through the mud.

Politicians sign up for political campaigning and all that it brings with it. Judicial nominees do not. Instead, they have spent a lifetime building extraordinary legal careers only to find that being called by their President to public service is an invitation to witness the destruction of all they have worked for. One has to ask the question at what point will the need for self-preservation outweigh the honor of serving the Nation on the Federal bench?

What scares me as a citizen is not that the distortions aren't just mistakes created by sloppy research, they are planned misstatements, deliberate omissions of fact, coming from our elected representatives as well the self-interest groups that appear to be in control over our Senate Judiciary Committee. These folks actually seem proud of their efforts.

While the Senate has become mired in a morass of delay and partisanship, there has been a flurry of activity on one front in the Senate Judiciary Committee. In an attempt to remake the advise and consent role of the United States Senate, New York Senator Charles Schumer has held several hearings on the role of ideology in the confirmation process as an outspoken proponent of ideolog-

ical litmus tests. For those of you who subscribe to litmus tests, would Louis Brandeis, would Benjamin Cardozo, would John Marshall Harlan or even David Souter, Byron White, would any of these Justices have passed this litmus test today?

I have a series of written testimony statements about some of these organizations. One I focus on is the Americans United for Separation of Church and State. This is one of the only groups that has come out in favor of the ninth circuit decision. It is truly extraordinary to see what kind of groups have hijacked this process.

Now, clearly the advice and consent process in the Democratic-controlled Senate has been captured by the most extreme elements of the Democrat base. If this pattern continues, we may as well just abandon historic constitutional fences. The laws that you pass here in Congress will mean nothing because the activist judges will feel compelled to rewrite as the mood of the agenda strikes them. It is ironic that those Bush judicial nominees so stridently opposed by left-wing organizations are strict constructionists who would not meet judicial activism with judicial activism. These are judges who will apply the law as they find it, rather than stretching the Constitution like a rubber band to fit the political agenda of the day.

If this continues, eventually the only people who will wind up on the Federal bench will be a group of activists approved by extremist elements. The notion of fair Federal judges and the independence of the judiciary will be shredded relics. My son and unborn child and millions of American children deserve a far better legacy.

Mr. CHABOT. Thank you very much. We appreciate your testimony.

[The prepared statement of Ms. Daly follows:]

PREPARED STATEMENT OF KAY R. DALY

Thank you, Chairman Chabot and Members of the Subcommittee, for inviting me to testify today on the cause and effect of the vacancy crisis in the federal judiciary.

My name is Kay Daly and I am the spokesperson for the Coalition for a Fair Judiciary. The Coalition for a Fair Judiciary is an organization comprised of more than 70 diverse grassroots groups dedicated to supporting qualified, capable federal judicial nominees who are committed to fair, impartial, and unbiased interpretation of existing law. We believe that judicial activism, characterized by rulings that create law rather than apply the law, has had a detrimental impact on American society and commerce. We seek to support federal judicial nominees who, in the words of Socrates, will "hear courteously, answer wisely, consider soberly and decide impartially."

The Coalition focuses on all federal judicial nominees, including nominees to the Court of Appeals, U.S. District Courts, and the Supreme Court. The coalition we have managed to put together crosses ideological, racial and theological lines. One thing steadfastly holds us together—to see that the most qualified and self-disciplined judicial nominees who respect the protective limits of judicial restraint are confirmed to the federal bench.

First, let me state for the record that I am not an attorney. While that might be an applause line in many corners of this country, I find myself outnumbered in this hearing room today by attorneys at the top of their profession. Be gentle with me.

As a communicator who has experience in corporate, legal, political and crisis communications, I can assure you that no greater challenge has crossed my desk in recent years than the judicial nominations process. As one gains years of experience as a communicator, one learns that excellent communicators always try to tell the truth. For once truth is no longer a valuable commodity, once truth becomes buried by a "win at all costs" agenda, we all suffer. And once venerable institutions like the judiciary suffer irreparable harm.

The judicial branch of government is not immune to injury. Once the public learns distrust, re-education is a long term and difficult endeavor. It's not as if the bad guys are the only ones who lose. Everyone loses. The public does not distinguish

between fact and fiction once fabrication reaches critical mass. Instead, the public just discounts everyone involved. Often the best actor wins.

For judges, the process of being nominated has become brutal. As you all are keenly aware, once a nominee starts down the confirmation path, he is essentially gagged until the confirmation hearing. The months, weeks, and for many of President Bush's nominees, the years that pass before the confirmation hearing are marked by a well-orchestrated smear campaign marked by unfounded charges, ad hominem insults, red herrings, canards, personal attacks, innuendo and outright fabrications. Accusations from well-funded extreme liberal groups are bent, not on disclosing truth, but ensuring the preservation of an activist agenda by manipulating the composition of the most powerful branch of the federal government. Meanwhile, a beleaguered nominee and his family must endure the excruciating ordeal of watching helplessly as their family name is dragged through the mud.

Our parents probably told most of us that we can spend years building a solid reputation, but it takes only a few seconds to destroy it. What should any of us do when mean-spirited, perhaps even callous persons are the catalysts? Where is the recourse? How do we stop it?

Politicians sign up for political campaigning and all that it brings with it. Judicial nominees do not. Instead, they have spent a lifetime building extraordinary legal careers only to find that being called by their President to public service is an invitation to witness the destruction of all they have worked for. It means the destruction of their credibility, their integrity, and their reputation due to no fault of their own. They are persecuted simply because they were called by a President who didn't represent a particular political platform.

One has to ask the question: at what point will the need for self-preservation outweigh the honor of serving the nation on the federal bench? Having witnessed the morass into which the confirmation process has devolved, we have arrived at the point contend, "I just won't put my family through this."

What scares me as a citizen is that the distortions aren't just mistakes created by sloppy research. They are planned misstatements, deliberate omissions of fact, coming from our elected representatives as well as the self-interest groups that appear to be in control of our Senate Judiciary Committee. These folks actually seem proud of their efforts.

I find the lack of civility disgraceful and disrespectful not only to the people nominated but to American democratic insitutions. How have we lost our conscience? How have we become this rude? How have we become indifferent to appropriateness and so disrespectful?

The Washington Post editorial page, which has written often and consistently on the judicial confirmation process, has similarly stated: "Failing to hold [hearings] in a timely fashion damages the judiciary, disrespects the president's power to name judges and is grossly unfair to often well-qualified nominees." (November 30, 2001)

Effectively, the Senate has been hijacked by the political terrorism of extreme left wing groups like the ultra-liberal People for the American Way. Their goal is to preserve liberal judicial activism of the past and ensure further activism in the future. These groups are well funded, well organized, and they have the run of the Senate Judiciary Committee. People for the American Way enjoys funding from the Hollywood left and curiously, several media outlets. I wonder whether the Disney company is aware of PFAW's continual support and defense of Internet pornography and children's access to it.

The modus operandi of People for the American Way and associated organizations is simple. It starts with an "investigation" of the nominee. They look for anything that can point to a one-word charge: racist, sexist, homophobe. If all else fails, the label can be "conservative" or any variation of that moniker.

Then, they trot out the self-proclaimed legal ethicists. Needless to say, these ethicists support the position of these organizations, clucking about how the sky will fall and justice as we know it will cease to exist if the nominee is confirmed. Curiously, though, these ethicists usually have an extensive history of supporting liberal causes and candidates. They leave a trail like an elephant with a nosebleed in the snow.

It is tough to perceive objectivity in an ethicist who was photographed on top of a car at Northwestern University protesting the Vietnam War as leader of the radical Students for a Democratic Society (SDS) surrounded by police officers. And yet, this describes a favorite ethicist used extensively by Ralph Neas, president of People for the American Way to discredit judicial nominees.

Another "objective" legal ethicist wrote an article for *The Nation* entitled "The Other Y2K Crisis" on July 26, 1999, in which he made his political sympathies entirely known while describing himself as "progressive." In the article, he "objec-

tively" wrote "My Y2K nightmare is that Republicans will win the White House and keep control of Congress."

Despite all of this, our President has nominated judges at a record pace. The President has now nominated 127 Article III judges to include 32 circuit, 94 district, and 1 International Trade judge. President Bush reached 100 nominations on May 1, 2002, faster than any President in history. At the same point in their terms, President Clinton had nominated only 77 judges, former President Bush had nominated 49, and President Reagan had nominated 61 judges.

The result of the political gamesmanship of Senate Democrats and their special interest allies is a vacancy crisis in the federal judiciary. In 1998, at a time when there were *50* judicial vacancies, Senator Leahy stated that the number of vacancies represented a "judicial vacancy crisis."

As of today, there are 77 vacancies out of 862 authorized circuit and district court judgeships, a 9% vacancy rate. The crisis has worsened substantially. Chief Justice Rehnquist's recent year-end report on the judiciary labeled the current situation as an "alarming number of judicial vacancies."

The Judicial Conference of the United States has classified 30 of the current vacancies as "judicial emergencies." The President has 21 individuals nominated to fill a seat designated as a judicial emergency.

The 13 circuit courts of appeals, the courts of last resort in the vast majority of federal cases, face a particular crisis with 27 vacancies out of 179 authorized judgeships, an extraordinary 15.1% vacancy rate. The vacancy rate is an especially serious problem in light of the enormous caseload: Filings in the courts of appeals reached an all-time high last year and have increased 22% since 1992.

Wallace D. Riley, former president of the American Bar Association and the State Bar of Michigan, wrote to Senator Leahy on February 13, 2002:

> "I am writing to express my concern that the U.S. Circuit Court[s] of Appeals, the courts of last resort in the vast majority of federal cases, face a particular crisis with . . . [an] extraordinary 19% vacancy rate. . . ."
>
> "I share Chief Justice Rehnquist's concern about the effect continual delays are having on our judicial system. Our Judiciary is already overburdened by its current caseload and further delays could potentially place the federal appellate system on life support.
>
> "Numerous businesses and citizens are waiting for cases to be decided that may have substantial effects on their financial and personal futures. Having the resolution of their cases continuously delayed is unjustly punishing these litigants.
>
> "I urge you to heed President Bush's call and act not as Republicans and Democrats, but as Americans. It is time [for] the Senate act for the good of our judicial system."

The Sixth Circuit Court of Appeals, covering Kentucky, Michigan, Ohio, and Tennessee, is operating at just over half strength, with 7 vacancies on a 16-judge court. In March 2000, at a time there were 4 vacancies on that court, Chief Judge Merritt of the Sixth Circuit wrote to the Senate Judiciary Committee about the crisis: "The Court is hurting badly and will not be able to keep up with its work load. . . . Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. . . . The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant."

The D.C. Circuit Court of Appeals, which other than the Supreme Court is often considered the most important federal court in the Nation because of the constitutional cases that come before it, is operating with a third of its judgeships vacant (4 vacancies on a 12-judge court).

The caseload in the federal courts can be expected to increase further as a result of the war on terrorism, as well as other criminal and civil matters that arise out of the September 11 attacks.

The President has 7 nominees pending to the 6th Circuit, and 2 nominees pending to the DC Circuit. Three of these nominees (Jeff Sutton, Deborah Cook, and John Roberts) have been waiting since May 9th of 2001 for a hearing.

The President has acted decisively in response to the vacancy crisis, but the Senate has not. The current pace of Senate confirmation is unacceptable, particularly as to circuit judges, and is far slower than in analogous circumstances in the past. In the first year of President Bush's term in office successful nominees took an average of 112 days from nomination to confirmation. In the first year of President Clinton's presidency it was an average of 52 days between nomination and confirmation.

Despite the President's record pace of nomination, the number of vacancies has actually increased due to the Senate's slow pace of confirmation, which has not even kept up with judicial retirements. At the end of the 106th Congress there were only 67 vacancies, and on the day President Bush was inaugurated there were 82. Now, there are 77 vacancies.

To date, the Senate has confirmed only 14 of the President's 32 circuit court nominees (44%). By contrast, President Clinton had 19 of his 22 circuit nominees confirmed by the same date (86%).

At the least, it would seem the Senate should strive to treat President Bush's nominees the same way President Clinton's judicial nominees were treated in his second year in office. President Clinton had 100 Article III judges confirmed in the second year of his presidency. President Bush's second year has seen only 52 Article III confirmations.

Notwithstanding the vacancy crisis, the Senate voted on only 28 of the President's 66 nominees in President Bush's first year in office (42%). Notwithstanding the especially serious vacancy crisis in the circuit courts of appeals, the Senate confirmed only 6 of the President's 29 circuit nominees (21%).

In President Bush's first year the Senate voted on only 24 of the 44 nominees who were nominated before the August recess of 2001. That is a sharp departure from the Senate's traditional practice with respect to first-year nominees of a new President. In the first year of the past three Administrations, all but one of the nominees who were nominated before the August recess were voted on and confirmed in the first year of the Presidency.

The Senate's treatment of the President's first 11 nominees illustrates the Senate's delay. On May 9, 2001, at an event in the East Room, the President announced the nomination of 11 judges—including 8 nominees for judicial vacancies classified as emergencies" by the Judicial Conference of the United States. All 11 nominees subsequently received a "well qualified" or "qualified" ABA rating. In March 2001, Senator Leahy referred to the ABA rating as the "gold standard" for evaluating judicial nominees.

More than a year has now passed since those nominations, yet the Senate Judiciary Committee has not even held hearings for 4 of the 11 nominees. As *The Washington Post* editorial page stated *almost exactly one year ago*, "[t]he Judiciary Committee chairman, Democratic Sen. Patrick Leahy, has offered no reasonable justification for stalling on these nominations." (November 30, 2001)

The impact of Senate foot-dragging on Americans' lives and the judicial system at large is hard to overstate. As Lloyd Cutler, President Clinton's White House Counsel, and former Congressman Mickey Edwards, wrote in *The Washington Post*, "Delay in confirming judges means justice delayed for individuals and businesses, and, combined with the bitter nature of some confirmation battles, it may deter many qualified candidates from seeking federal judgeships." (March 13, 2002)

Judicial nominees deserve a prompt hearing and vote in the Senate. On May 9, 2001, the President made the following request of the Senate: "I urge Senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house, and no matter who controls the Senate. I ask for the return of civility and dignity to the confirmation process."

During the 2000 presidential campaign, Senator Leahy stated: "I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days."

In his recent year-end report on the judiciary, the Chief Justice of the United States emphasized the same principle: "On behalf of the Judiciary, . . . I ask the Senate to schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination."

In June 1998, at a time when there about 75 vacancies, Senator Daschle stated: "We cannot wait for the judicial system to collapse before the Senate acts." He asked for the Senate to "significantly accelerate the pace of scheduled judicial confirmations."

In July 1998, at a time when there were 68 vacancies, Senator Leahy stated: "Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges."

The devastating effects of the judicial vacancy crisis can most readily understood by the almost half empty Sixth Circuit Court of Appeals. Those judges remaining on the court have displayed remarkable affinity for judicial activism, with a liberal bent that rivals the now infamous Ninth Circuit.

Recently, the Sixth Circuit Court of Appeals issued a 5–4 opinion in *Grutter* v. *Bollinger*, which upheld the University of Michigan Law School's policy of considering race and ethnicity in admissions decisions. While the legal basis for the decision is controversial, even more troubling are the claims by a minority of the court's members that the Chief Judge (a Carter appointee) violated procedural rules in making the panel assignment in the case and in failing to circulate the plaintiffs' *en banc* court petition to the full court in a timely manner.

Both procedural abnormalities could have affected the outcome of the case and raise questions about whether the Chief Judge and others on the court have sought to take advantage of the Sixth Circuit's vacancy crisis and the Democrats' current 6–3 majority.

In August 1999, a three-judge panel of the Sixth Circuit consisting of two circuit judges and a visiting senior district judge decided a procedural issue in *Grutter* without reaching the merits of the lawsuit.

After the first appeal and before the filing of the second appeal, the Chief Judge inserted himself into the original panel—replacing the visiting senior district court judge—a practice which the Chief Judge apparently has engaged in on a regular basis outside of the knowledge of some members of the Sixth Circuit. This new three-judge panel then heard several interlocutory motions in the case, which were redirected to it by the court's motions panel.

When the case came back to the Sixth Circuit on its second substantive appeal, court rules required either that the original panel hear the appeal or that the appeal be randomly assigned to a new three-judge group: the so-called "must panel" rules. By assigning the case to the improperly constituted panel containing the Chief Judge, the court followed neither rule in this case.

In addition, upon return of the case to the Sixth Circuit, only two of the three original judges on the panel were available to hear the next appeal. The court's rules then required that the court fill out the panel by random assignment. Instead of following that rule (and without the knowledge of other members of the court), the Chief Judge remained on the panel to hear the substantive appeal.

On May 14, 2001, plaintiffs in this case requested that the entire Sixth Circuit hear their appeal. At this time, the court consisted of eleven active judges, including two Republican appointees who had previously announced their intention to take senior status in the coming months.

On June 4, 2001, the Chief Judge issued an order stating that the motion for an *en banc* hearing had come before the court, but that the court would hold the petition in abeyance until after the filing of the briefs. After the briefs were filed, the court would determine whether to submit the case to the en banc court or to a three-judge panel. Neither this order, nor the petition were circulated to the entire court.

On June 18, 2001, the appellees filed their brief, but the court again failed to submit the en banc petition to the whole court. On July 1, 2001, one of the Republican appointees took senior status, and all briefing on the case was completed by the end of the month. Still, the Chief Judge failed to circulate the en banc petition to the court.

On August 15, 2001, the second Republican appointee took senior status, leaving the Court with its current 6–3 Democrat majority and with a 5–4 majority to uphold the University of Michigan policy. Nonetheless, the Chief Judge eight days later referred the petition to the improperly constituted three-judge panel.

Some five months later, and after questions were raised about the composition of panel, the Chief Judge notified the court of the existence of the en banc petition. At this point, the court had been reduced to nine members, including six Democrat-appointed judges.

This is not the first time that the Sixth Circuit has engaged in apparent procedural abnormalities. In a 2001 death penalty habeas case, the court made an unusual and unprecedented procedural ruling which allowed it to bypass the decision of a three-judge panel to deny habeas relief to a convicted capital murderer.

In *In re John Byrd*, 269 F.3d 585 (6th Cir. 2001), after a three-judge panel denied a defendant's motion to file a second habeas petition, a majority of active judges on the Sixth Circuit voted to remand the case to district court for the development of a factual record to permit the *en banc* court to consider *sua sponte* the defendant's second habeas petition.

The Court also remanded the case to the Chief Judge of the Southern District of Ohio for appointment of a Magistrate Judge, rather than ending it back to the District Court judge to whom it was originally assigned pursuant to the court's "blind draw" rules.

According to one dissenting judge in the case, this action by the Sixth Circuit was "lawless" and without support in 28 U.S.C. § 2254, the federal habeas corpus statute enacted pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA).

According to the dissent, the *en banc* court essentially "fired the [three-judge] panel and [took] over the case *sua sponte*" and "unlike any habeas corpus case to ever come before this Court . . . the en banc court will not act as a reviewing body of the panel, but will become the panel itself." 269 F.3d585, 598 (6th Cir. 2001).

Has the response of the United States Senate been to rapidly confirm the President's nominees to the Sixth Circuit? No. Instead of "advise and consent," the process has deteriorated into "admonish and obstruct." Effectively, while the Senate fiddles, the Sixth Circuit burns.

There has been a flurry of activity on one front in the Senate Judiciary Committee. In a blatant attempt to remake the "advise and consent" role of the United States Senate, New York Senator Charles Schumer has held several hearings on the role of ideology in the confirmation process. He has been an outspoken proponent of ideological litmus tests. These hearings at best have been the source of further delay and at worst, seek to compromise the very independence of the third branch of government, the federal judiciary. But for those of you who subscribe to litmus tests, would any of the following brilliant legal minds have been confirmed under those guidelines?

As Attorney General of the State of Kentucky, he prosecuted a Union general for the then "crime" of helping slaves to escape. *Kentucky* v. *Palmer*, 65 Ky. (2 Bush.) 5 (1886). Who was he? The first Justice John Marshall Harlan, who, once on the bench, wrote the famous dissent in the *Plessy* v. *Ferguson* arguing against "separate but equal."

Prior to ascending to the bench early in the last century, he had become a millionaire twice over and had many big businesses as clients. In 1902, he proposed taking immunity from suit away from unions: "If unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness." In an 1899 brief to the Supreme Court on behalf of a shoe industry monopolist, he argued that "in certain things we have got to have a monopoly." Seven past presidents of the ABA signed a petition declaring that he "is not a fit person to be a Member of the Supreme Court of the United States." Who was he? The great liberal justice, Louis Brandeis.

As a lower court judge, in 1927 he held that evidence obtained through an illegal search and seizure was admissible in a criminal proceeding. In doing so, he rejected a growing line of federal decisions that were at variance with his opinion. His attitude was that "a room is searched against the law and the body of a murdered man is found. The privacy of a home has been infringed and the murdered goes free. We may not subject society to these dangers." Who was he? Benjamin Cardozo.

Consider this fellow, a liberal's dream nominee. He helped found the ACLU, was a legal adviser to the NAACP, wrote editorials in the New Republic and the Atlantic Monthly. Who was he? Felix Frankfurter, who turned out to be one of the great strict constructionist justices once on the Court.

According to the ultra liberal group Alliance for Justice, this Supreme Court Justice has "has proven to side with the liberal bloc on most issues. [He] has consistently voted for women's right to choose whether to abort, and he joined the majority in *Stenberg* v. *Carhart*, finding Nebraska's ban on partial-birth abortion unduly burdensome. [He] also supports affirmative action and the strict separation of church and state. He voted in the minority of three in *Mitchell* v. *Helms*, holding that loans of federally funded equipment to parochial schools violated the Constitution. He supports the extension of the protection from discrimination against minorities and women to homosexuals." Yet when this Supreme Court Justice was nominated, the Left screamed like scalded cats calling him a "stealth candidate." Who is he? Justice David Souter.

A lot of the groups claiming to represent the public interest are just plain extreme left wing groups who will say or do anything to push their narrow agendas. They are extremists, yet the Senate Judiciary Committee is listening to them and quashing nominees at their request.

As a single example, let's look at just one group that has exercised significant influence in quashing a number of Bush nominees. Americans United for the Separation of Church and State is headed by Barry Lynn, a Unitarian minister. The group claims to be a watchdog, here to save us all from the improper entanglement of church and state.

Of course, if there is a Christmas cresh or a menorah or a Christmas tree displayed anywhere on public property, rest assured Americans United will be there to file a suit to have it removed.

And the group backed a lawsuit against the mention of God in the Ohio state motto.

They have a particular problem with the national motto, "In God we Trust." When a Colorado school district decided to hang the motto in classrooms, Barry Lynn sneered, stating "I find it hard to believe that Colorado parents want their children's schools run by remote control by a fundamentalist preacher in Tupelo, Mississippi." (Stephanie Salter, *Colorado's Godly Idea*, Tulsa World, July 23, 2000.) Lynn is a little unclear on this point, since he's also said that the motto is meaningless when it is used on money; but that if children are exposed to the motto in public schools, it is dangerous because it is "a different and new use for promotion of religious ideas." (Michael Janofsky, *Colorado Asks: Is "In God We Trust" a Religious Statement?, NY Times*, July 3, 2000.)

Presumably, Americans United opposes the national anthem as well, since one of the later verses contains that motto as a lyric.

And remember when the members of Congress stood on the Capitol steps last year following the attacks, and sang "God Bless America"? Americans United has said that "this flagrant mixing of church and state is inappropriate." (http://www.au.org/press/pr090502b.htm (Americans United Press Release)) Moreover, they argue, it's "divisive." (Stephen Scott, *Faith & Flag*, The State, Columbia SC, November 9, 2001 (quoting Barry Lynn)).

In their effort to save us from God, Barry Lynn and his group have been some of the most outspoken opponents of a number of Bush nominees, including Attorney General John Ashcroft, and Professor Michael McConnell.

Barry Lynn told us back in 2000 that if John Ashcroft was confirmed as Attorney General, he would "take orders from extreme TV preachers and their political allies in the Religious Right". (Waveney Ann Moore, *God Bless America—Right?*, *St. Petersburg Times*, November 10, 2001.) We were additionally informed that Mr. Ashcroft's comments criticizing various Supreme Court decisions were the type of opinions normally found only among "religious extremists and anti-government militias." (http://www.au.org/press/pr11601.htm)

More recently, Americans United is telling us that Congress's nearly unanimous outcry over the 9th Circuit's recent decision which banned the Pledge of Allegiance from public recitation, was mere "hysteria." (http://www.au.org/churchstate/cs7023.htm)

Barry Lynn also led a campaign against the saying of an ecumenically approved prayer at Chicago's September 11th memorial service a few weeks ago. Barry Lynn and Americans United are clearly advocating the removal of any vestige of religion from public life.

But that's not the half of it.

At the same time, Barry Lynn and Americans United are trying to use the government, usually the courts, to attack religion wherever they find it. The group appears to believe that any government sale of land to a religious group is an illegal establishment of religion, and they fight such sales with lawsuits.

They are attempting to use the federal courts to force Baptist foster homes in Kentucky to hire homosexual staff. (http://www.aclu.org/about/transcipts/revlynn.html)

They want the courts to force the Catholic Church to pay for contraceptives, presumably including abortions, for its employees. (http://www.au.org/churchstate/cs/7023.htm) There's no word yet on whether they will sue to force Jewish kosher delis to serve ham sandwiches.

In a recent case, Americans United lost its bid to make the government treat religiously oriented schools differently from purely secular schools when issuing grants. Americans United argued that treating a religiously oriented school the same under the law as a secular school would violate the Establishment Clause. Fortunately, Americans United lost. Otherwise currently religious schools like Notre Dame, or former divinity schools such as Yale, Harvard might face losing federal grants, scholarships and aid money that supports students and funds research.

Barry Lynn is also on record as opposing the use of "taxpayer funds for chaplains," including military chaplains. (http://www.aclu/org/about/transcripts/revlynn.html) I wonder if we can truly imagine our sons and daughters facing battle in the Middle East, without the benefit of spiritual counsel?

I don't think it matters whether you're a Democrat or Republican, I believe you'd concede that Americans United presses an extremist agenda. To advance its position, Americans United needs a federal judiciary that is enthusiastic about its radical beliefs, a court that essentially willing to trump Congress and write law.

That's why they oppose President Bush's judicial nominees. The Bush nominees who are judicial conservatives (regardless of their personal opinions), could not in

good conscience usurp the power of the legislature the way Barry Lynn and Americans United want them to do.

The advice and consent process in the Democrat controlled Senate has been captured by the most extreme elements of the Democrat base.

Their control over the Democrats on the current Senate Judiciary Committee is bold. Ralph Neas's People for the American Way has been extremely active in targeting highly qualified Bush nominees, as has the National Abortion Rights Action League, the Leadership Conference on Civil Rights, the National Organization for Women, Alliance for Justice and the list goes on. Their vitriolic message points are robotically repeated by Democrat senators in nomination after nomination.

These groups meet regularly to plot against targeted nominees. "Research" is conducted with an eye to "gotcha" politics. Funding pours in from unions, Hollywood and trial lawyers. More "research staff" is hired. Reports on judicial nominees laced with message points are formulated and distributed. As if by magic, these message points bounce from the various websites of these organizations to echo in the marathon questioning of judicial nominees by Democrats during confirmation hearings to finally land in the pages of *The New York Times*. If the end results weren't so catastrophic to our judicial system, this well-oiled machine would be a thing of beauty.

If this pattern continues, we may as well just abandon historic constitutional fences. The laws you pass here in Congress will mean nothing, because the activist judges will feel compelled to rewrite them, as the mood or the agenda strikes them.

Meanwhile, constitutional conservatives have been consistent on their view of the Senate's role in the confirmation process. Thirty years ago, Barry Goldwater wrote "The President of the United States should be given broad leeway in choosing judicial nominees who might reflect the same broad philosophy as his own on major matters of the day. So long as a nominee is a man of high ability, scholarship, integrity and diligence, without any significant conflict of interest in his past record, he should be confirmed by the Senate." (68 ABA Journal 135 Feb. 1972).

It is ironic that those Bush judicial nominees so stridently opposed by left wing organizations are strict constructionists who would not meet judicial activism with judicial activism. These are judges who will apply the law as they find it rather than stretching the Constitution like a rubber band to fit the political agenda of the day.

Most Americans might not know the difference between a federal court and a tennis court, but they do know, thanks to the Ninth Circuit Court's Pledge decision, that something is terribly, terribly wrong in the judiciary.

I am a mom—a stay-at-home mom. I have a beautiful 18-month old boy and have another child on the way. It doesn't take long after the birth of your first child to figure out what is really important in this life. This nation has given my family much, and every generation of my family has felt indebted and has answered the call to service whether it be on a battlefield, in the political process, or simply as a decent citizen who contributes to the betterment of society. I can think of no better tribute to either those that have gone before me or generations to follow than preserving the legacy of a nation that has a court system intact with the rule of law paramount to all involved.

APPENDIXES

JUDICIAL APPOINTMENTS AND VACANCIES

President	Total No. Appointed
Reagan	382
Bush	193
Clinton	377

Vacancies as of October 1, 2002 = **79**/862 = 9.2%

Nominees **pending** as of October 1, 2002 = **47**

Nominees pending as of October 1, 2002 **without a hearing** = **31**

Year	Congress	President	Senate	No. of Vacancies	% Vacant	No. Hanging
2000	106th	Clinton	Rep.	67/848	7.9%	41
1998	105th	Clinton	Rep.	50/843	5.9%	
1996	104th	Clinton	Rep.	65/844	7.7%	
1994	103rd	Clinton	Dem.	63/846	7.4%	
1992	102nd	Bush	Dem.	97/846	11.5%	54

Source: Judiciary Committee, Minority Nominations Unit.

Article III Judicial Nomination Report
Administration Comparison – First Two Years

Bush Nomination Tallies as of October 3, 2002

President	Congress	Circuit Court Nominations Submitted	Circuit Court Nominations Confirmed	District Court Nominations Submitted	District Court Nominations Confirmed	TOTAL Submitted	TOTAL Pending	TOTAL Confirmed
Bush 43 2001 -2002	107th	32	14 (44%)	75	66 (88%)	127[a]	47[a]	80 (63%)
Clinton 1993 -1994	103rd	22	19 (86%)	119	108 (91%)	143[b]	-	129[b] (90%)
Bush 41 1989 -1990	101st	23	22 (96%)	52	48 (92%)	76[c]	-	71[c] (93%)
Reagan 1981 -1982	97th	20	19 (95%)	69	69 (100%)	90[d]	-	89[d] (99%)
Carter 1977 - 1978	95th	13	13 (100%)	56	51 (91%)	69	-	64 (93%)

Vacancies as of Nov. 1 at the end of the second year of each Administration: Clinton = 59 (7.0%), Bush 41 = 37 (4.9%), Reagan = 23 (3.4%)
Current Vacancies: Bush = 77 (8.9%)

a. Total includes one Court of International Trade Nominee
b. Total includes two Supreme Court Nominees - *Ginsburg, Breyer*
c. Total includes one Supreme Court Nominee - *Souter*
d. Total includes one Supreme Court Nominee - *O'Connor*

Status of Article III Judicial Nominations

Tuesday, October 01, 2002

Total number of Bush judges confirmed, 2001-Present:	78

STATUS OF JUDICIAL NOMINEES	Committee	Floor	Confirmed	Defeated	Total Nominees
US Circuit Court Judge	15	1	14	2	**32**
US District Court Judge	28	2	64		**94**
USIT Judge	1				**1**
TOTAL Status:	**44**	**3**	**78**	**2**	**127**
TOTAL Pending:	**47**				

IN COMMITTEE HEARING STATUS	Hearing Held	Without Hearing
US Circuit Court Judge	3	12
US District Court Judge	10	18
USIT Judge	0	1
TOTAL:	**13**	**31**

VACANCIES			VACANCIES w/o NOMINEE TO FILL POSITION	
US Circuit Court Judge	27		US Circuit Court Judge	9
US District Court Judge	51		US District Court Judge	21
USIT Judge Judge	1			
TOTAL vacancies:	**79**	9.2%	**TOTAL w/o Nominee:**	**30**

JUDICIAL EMERGENCIES	Vacancies	Nominees to fill Vacancies
US Circuit Court Judge	17	11
US District Court Judge	13	10
TOTAL:	**30**	**21**

As of Tuesday, October 01, 2002 U.S. Senate Committee on the Judiciary

107 Congress Summary: Status of All Committee Nominees

Category	Committee	Floor	Confirmed	Defeat	Withd	Return	Total Nominees
Commissioner	2		1			2	5
DOJ			26				26
Other	7	1	5				13
US Attorney	3	1	80		2		86
US Circuit Court Judge	15	1	14	2			32
US District Court Judge	28	2	64				94
US Marshal	8		71		1		80
USIT Judge	1						1
Total By Status:	64	5	261	2	3	2	337
Total number in Committee or on the Floo	69						

Status of Judicial Nominees

Category	Committee	Floor	Confirmed	Defeated	Total Nominees*
US Circuit Court Judge	15	1	14	2	32
US District Court Judge	28	2	64		94
USIT Judge	1				1
Total By Status:	44	3	78	2	127
Total Nominees Pending (Committee or Floor)	47				

*Withdrawn and Returned nominees not shown in Judicial summary, but reflected in "Total Nomine

Last Updated 10/1/2002

Nominees With Complete Paperwork- Pending in Committee

Complete paperwork without the ABA means that the Committee has recieved a nomiee's official nomination, Questionnaire, FBI file, and Blue Slips from both senators. (The dates reflect receipt of the second round of blue slips sent by the Chairman).

US Circuit Court Judge

Name	Office	Nom Date	Complete	ABA Received
☑ Dennis W. Shedd	Fourth Circuit	5/9/2001	9/14/2001	6/19/200 Maj WQ, Min Q
☐ Miguel A. Estrada	District of Columbia Circuit	5/9/2001	7/14/2001	7/9/2001 Unan WQ
☐ Michael W. McConnell	Tenth Circuit	5/9/2001	9/18/2001	7/10/200 Unan WQ
☐ Deborah L. Cook	Sixth Circuit	5/9/2001	9/14/2001	6/11/200 Unan Q
☑ Jeffrey S. Sutton	Sixth Circuit	5/9/2001	9/14/2001	6/11/200 Maj Q, Min WQ
☐ John G. Roberts, Jr.	District of Columbia Circuit	5/9/2001	5/15/2001	6/20/200 Unan WQ
☐ Timothy M. Tymkovic	Tenth Circuit	5/25/2001	9/14/2001	9/10/200 Maj Q, Min NQ
☑ William H. Steele	Eleventh Circuit	10/9/2001	11/20/2001	12/3/200 Sub. Maj Q, Min NQ
☑ Jay S. Bybee	Ninth Circuit	5/22/2002	6/7/2002	7/16/200 Sub Maj WQ, Min Q

Checkmark by names indicates that nominees was nominated to fill a Judicial Emergency.

US District Court Judge

Name	Office	Nom Date	Complete	ABA Received
☐ William J. Martini	District of New Jersey	1/23/2002	8/16/2002	3/26/200 Maj Q, Min NQ
☐ Stanley R. Chesler	District of New Jersey	1/23/2002	8/16/2002	3/14/200 Unan WQ
☑ Daniel L. Hovland	District of North Dakota	5/26/2002	8/9/2002	9/12/200 Unan Q
☐ Thomas W. Phillips	Eastern District of Tennesse	5/26/2002	7/17/2002	9/4/2002 Unan WQ
☐ Alia M. Ludlum	Western District of Texas	7/11/2002	7/29/2002	8/26/200 Sub. Maj WQ, Min Q
☑ Robert A. Junell	Western District of Texas	7/18/2002	8/20/2002	
☑ S. James Otero	Central District of Californi	7/18/2002	9/16/2002	
☑ Robert G. Klausner	Central District of Californi	7/18/2002	9/16/2002	
☐ William E. Smith	District of Rhode Island	7/18/2002	8/1/2002	9/24/200 Unan Q
☐ Jeffrey S. White	Northern District of Califor	7/25/2002	8/1/2002	9/4/2002 Sub. Maj Q, Min WQ
☐ Mark E. Fuller	Middle District of Alabama	8/1/2002	9/4/2002	9/24/200 Sub Maj Q, Min NQ
☐ Freda L. Wolfson	District of New Jersey	8/1/2002	8/23/2002	9/20/200 Unan WQ
☐ Jose L. Linares	District of New Jersey	8/1/2002	8/16/2002	9/23/200 Unan WQ
☑ Robert B. Kugler	District of New Jersey	8/1/2002	8/16/2002	9/18/200 Unan WQ
☐ William D. Quarles	District of Maryland	9/12/2002	9/25/2002	

Checkmark by names indicates that nominees was nominated to fill a Judicial Emergency.

Byron York
White House Correspondent

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April 26, 2002 8:45 a.m.

Media For The American Way

Why are big news organizations supporting a high-profile liberal lobbying group?

People for the American Way, the liberal interest group that has spearheaded some of the most intensely partisan attacks on President Bush's judicial nominees, has received financial support from several of the nation's top-tier media organizations, including the New York Times Company, Time, Inc., and CBS.

Annual reports from People for the American Way have listed those companies — along with other media organizations like NBC, Disney (parent company of ABC), and America Online — among its financial supporters. It appears that the media corporations, some of which operate their own charitable foundations, did not make direct contributions to People for the American Way, but instead purchased tables — for $500 to $600 per seat — at the group's annual fundraising dinners in New York City.

A spokeswoman for the *New York Times* says the New York Times Company Foundation bought tables at People for the American Way fundraisers in 1998, 2000, and 2001. The 1998 dinner, which honored *Times* chairman emeritus Arthur Ochs Sulzberger Sr., was also something of a celebration of First Lady Hillary Rodham Clinton, whose husband was at the time trying unsuccessfully to fend off impeachment in the Monica Lewinsky matter. "Several hundred admirers in formal wear cheered when the first lady arrived at their cocktail hour," said an Associated Press account of the dinner at the Waldorf-Astoria hotel. "The audience was obviously enamored of Mrs. Clinton." (The dinners have frequently been celebrations of liberal politics; the year before the

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Ledeen: Sniper, Saboteur, or Sleeper? 10/15 9:00 a.m.
Schweizer: WWRD? 10/15 9:00 a.m.

first lady's appearance, for example, the event featured filmmaker Michael Moore as its host.)

A spokesman for Time, Inc. says the company last contributed to a People for the American Way dinner in late 2000 but has since changed its policy about participating. "We determined that for news organizations such as ours, it would not be appropriate for us to do that, so we stopped doing it," spokesman Peter Costiglio says. "We made a determination that this was not something we should support on a regular basis."

A CBS spokesman says the network also purchased seats for the 2000 dinner. Officials point out that CBS has had a long and close relationship with Norman Lear, the legendary television producer who founded People for the American Way in 1981. "We love Norman dearly," says network executive vice president Marty Franks. "After all, he did produce one of the most popular shows [*All in the Family*] in the history of CBS." But Franks, who earlier in his career served in top positions with the Democratic Congressional Campaign Committee and the staff of Vermont Democratic Sen. Patrick Leahy, says CBS at times finds itself at odds with Lear and People for the American Way over issues affecting the entertainment industry, and in fact bought tickets to the dinner because it was honoring Motion Picture Association of America head Jack Valenti. "We tend to give to more traditional charitable organizations," says Franks.

TAX-EXEMPT LOBBYISTS

The statement of purpose for People for the American Way says the group "organizes and mobilizes Americans to fight for fairness, justice, civil rights and the freedoms guaranteed by the Constitution." In Washington in recent months, People for the American Way has worked closely with Democrats on the Senate Judiciary Committee to oppose Bush White House judicial nominations. The group scored a high-profile success with the defeat of the nomination of Charles Pickering to a place on the Fifth Circuit Court of Appeals, and it is likely to launch similar campaigns against other Bush judicial choices in coming months. For example, People for the American Way chief Ralph Neas recently referred to appeals-court nominee Miguel Estrada as a "Latino Clarence Thomas," suggesting the group will wage a fierce battle to stop that nomination.

Although Neas engages in sharply partisan political activity, he presides over an organization that is both a lobbying group and a "nonpartisan" tax-exempt charity. The lobbying side, People for the American Way, is a so-called 501(c)(4) organization — named for the section of the Internal Revenue Service code that provides for such groups — and is legally allowed to engage in partisan political activity. But the other half of People for the American Way, the People for the American Way Foundation, is a 501(c)(3) organization, meaning it is allowed to receive

Robbins: Who Is the Sniper? 10/15 9:00 a.m.

Miller: Israel's Arrow Defense 10/15 9:00 a.m.

Flashback: The Master (Nation) Builder 10/15 9:00 a.m.

Nordlinger: Impromptus 10/15 9:00 a.m.

Flashback: Stephen Ambrose Says... 10/15 9:00 a.m.

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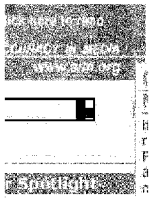

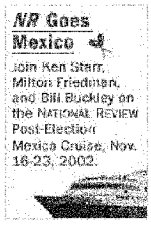

The Terror Visas
Mowbray: Visas that Should Have Been Denied 10/9

At War
Robbins: Case Closed 10/8

Politics
York: Leahy's Surprise Attack 10/9
Goldberg: Crunchy Conservatism, Reconsidered 10/8
Konig: Barbra Streisand, Tom Cruise, Alger Hiss, and Me 10/8
Miller: The National Academy of Junk Science 10/8

tax-deductible charitable donations but is prohibited by law from engaging in partisan political work.

Both sides of the organization take in impressive amounts of money from direct contributions and fundraising dinners like those attended by major media organizations. According to tax records for the year 2000, People for the American Way received $5,140,131 in contributions, while the People for the American Way Foundation took in $7,469,722 — for a total of $12,609,853 in one year alone.

It appears there is significant overlap between People for the American Way's partisan and nonpartisan sides. Neas's salary, for example, is paid by both the main group and the foundation. In 2000, he received $79,556 in salary from People for the American Way, the political arm, and $119,335 from the People for the American Way Foundation, the nonpartisan arm. The salary of People for the American Way's number-two officer, Carol Blum, was also divided between the two parts of the organization.

While it is true that People for the American Way does engage in some nonpartisan projects — like the purchase and exhibition of a 1776 copy of the Declaration of Independence — the group's aggressive attacks on the Bush administration suggests that the line between partisan and nonpartisan can sometimes be quite blurry. It is perhaps that mixing of the partisan and nonpartisan that led Time, Inc. to stop purchasing tables at People for the American Way fundraisers. But it appears that Time's decision is the exception, rather than the rule, concerning media support of People for the American Way.

CONTRIBUTORS TO PEOPLE FOR THE AMERICAN WAY AS LISTED IN ITS ANNUAL REPORT

MEDIA COMPANIES AND ADVERTISERS

Note: BOLDED NAMES REPORT ON JUDICIAL NOMINATIONS
ITALICIZED NAMES ARE ADVERTISERS

AK MEDIA
A&M RECORDS/POLYGRAM
AMERICA ONLINE
AMERICAN EXPRESS PUBLICATIONS CORP.
AUDIO BOOK CLUB
BMG MUSIC
BARNES & NOBLE
BDO SEIDMAN, LLP
BERTELSMANN
CAPITOL RECORDS/EMI
COLUMBIA BROADCASTING SYSTEM (CBS)
CENTER FOR ALTERNATIVE MEDIA & CULTURE
CHASE MANHATTAN CORPORATION
COMEDY CENTRAL
DELOITTE AND TOUCHE
DISCOVERY COMMUNICATIONS LATIN AMERICA
DREAMWORKS, SKG
FINE COMMUNICATIONS/MJF BOOKS
GOLDMAN, SACHS AND CO.
HITS MAGAZINE, INC
IDG BOOKS WORLDWIDE, INC.
INTERNATIONAL BUSINESS MACHINES CORP
JOSEPH P. KENNEDY ENTERPRISES *****
J&R MUSIC WORLD
KRUGER
MCA, INC
METROMEDIA CO
MORGAN STANLEY DEAN WITTER
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The Supreme Court has played different roles in the history of our country. Sometimes it has been a passive branch, resolving mostly private disputes and letting the political branches make and change public policy. Most of the time it has tried to avoid the "political thicket."

In 2000, however, it inserted itself into the granddaddy of all political disputes when it decided that Florida's electoral votes would be awarded to George Bush. While Bush v. Gore was an obvious attention-grabber, there have been others in which the current court has flexed its political muscles:

* It has imposed limits on what areas Congress can regulate. * It has cut back substantially on any affirmative action programs that government agencies can conduct, even when legislatively authorized.

* And doubt continues to fester on whether the Constitution guarantees a woman's right to terminate a pregnancy.

What makes these court decisions so troublesome, albeit fascinating, is that most have been resolved 5 to 4. With three justices over age 70, speculation about a change in the court's delicate balance is unavoidable. What kind of person would President Bush nominate? And what kind of nominee would the Senate confirm? Suppose the Senate did not confirm anybody. Would that be deemed political conduct? Would that be a responsible exercise of the Senate's constitutional power? I think the answer to both questions is yes.

There is nothing magic about the number nine for the size of the Supreme Court. The Constitution does not suggest a number, and the first court was authorized to have six members. The authorized number has gone up and down during our history, usually for very political reasons. It went to 10 in 1863 and then was reduced to nine because Congress was angry at President Andrew Johnson. In the 1930s when the court continued to strike down New Deal

legislation, President Franklin D. Roosevelt threatened to increase the size of the court by one for every justice who was over age 70. The plan failed in passage, but "apostasy and death" caused the court to reverse its doctrinal direction.

Vacancies also have persisted when the Senate was unhappy with the particular nominee that the president sent up for confirmation. While sometimes the retiring justice has continued to serve until a successor was chosen, often the resignation was immediate or the vacancy occurred as a result of death. For example, a vacancy existed for three years because Congress was unhappy with President Lincoln's choices, and then with those of his successor. When Congress was unhappy with Lyndon B. Johnson's effort to promote Abe Fortas to chief justice, a vacancy persisted for more than a year.

The Constitution states that the president is to nominate justices and appoint them "by and with the advice and consent" of the Senate. While presidents seldom request the advice of the Senate in advance of their nominations, it has occurred. President Hoover wanted to appoint a westerner to fill a vacancy, but his ally, Sen. William Borah of Idaho, persuaded him to appoint Justice Benjamin Cardozo instead. President Clinton was discouraged from nominating Sen. George Mitchell at least in part by senators who thought it would be a political mistake.

There are more than a few occasions in which the Senate has exercised its political powers to help shape the makeup of the court. There are special reasons why the present political climate warrants such an action.

First, this president does not have the mandate of a national plurality. While the court did resolve the dispute about Florida's electoral votes, giving President Bush an electoral college majority, it could not alter the popular vote. Bush lost to Al Gore by more than 500,000 votes. Most of the other appointments the president will make are for finite terms, but his choice to fill a vacancy on the court -- a lifetime appointment -- probably would serve for many years after the people resolve this political anomaly and elect a president who wins the popular vote.

Second, the delicate balance of the court on fundamental issues makes even a single appointment of great moment. During the Warren Court years, when the justices made some fundamental changes in criminal justice, elections and the system of segregation in our public institutions, there were usually substantial majorities supporting the result. The Warren Court did not strike down that many congressional decisions. But seldom in its history has the court invalidated so many acts of Congress by 5 to 4 decisions as at present.

Still another reason that the political climate warrants Senate involvement is that the court itself made the final decision as to who should be president. That judgment raised many doubts about the legitimacy of the court's actions. There was gossip that at least one of the justices was upset by the consequences to the court of a Gore victory, and that one of the justices in the 5 to 4 majority was close to changing his vote. Conservative scholars who favored the result of the case politically have nevertheless criticized the "equal protection" rationale the unsigned majority opinion provided for the decision. While the events of Sept. 11 have stilled much of the controversy about the manner in which the 2000 election was decided, there is still unhappiness,

partisan and otherwise, about the court's intervention.

The appointment of Supreme Court justices is a shared responsibility. The Senate has a plenary power to advise and consent. This has never been perceived to be some kind of rubber-stamp function, and it has been used with substantive results on less compelling occasions.

This Supreme Court is in an activist mood. Each year yields a bumper crop of decisions that overrule or modify political choices made by Congress. If there are to be changes in its personnel, they ought to be made by a president who has a popular vote mandate. I think the Senate should not act on any Supreme Court vacancies that might occur until after the next presidential election. Changes in the existing delicate balance could put the very legitimacy of the court as an institution at risk. Other than the black robes and the high bench, that legitimacy is all that the court has going for it.

The writer has served as a Democratic House member from Illinois, as chief judge of the U.S. Court of Appeals for the D.C. Circuit and as White House counsel under President Clinton. He is currently a visiting professor at the University of Chicago Law School.

LOAD-DATE: January 25, 2002

Mr. CHABOT. And now the Committee Members will have the opportunity to ask questions for 5 minutes, and I recognize myself for 5 minutes for that purpose.

Let me start with Mr. Gaziano. I couldn't help but notice when Mr. Neas was talking about the 35 percent of Clinton's appointees being blocked and some of his other comments in his testimony that you were shaking your head. So rather than ask you a long question, I would ask you what were your thoughts at that point, and what comments would you like to make?

Mr. GAZIANO. You can do a lot of funny things with percentages. That is why I tried to stick to some of the most obvious ones. But if you are going to make those kinds of comparisons, I would say there are three things that make the comparison apples to raisins or something like that. The first is he is comparing a period at the end of a President's second two terms to a period of the first.

More importantly, though, you have to look at the court of appeals nominees themselves. Many of the ones that President Clinton made were not with home State Senator support. President Bush hasn't done that. Ohio, your home, as you know, both home State Senators supported all of the nominees. It has been a tradition in the Senate to check with the home State Senators. Many of the nominees that are in this 35 percent were without home State support. Others, of course, were made late in the process, too late for the Senate to reasonably act on them.

Now, there were one or two that were held up. Most of them were eventually confirmed by the Senate. I am not saying there wasn't a slowdown. The slowdown, of course, was worse at the end of the Bush administration. There were far more court of appeals candidates left stranded that should have been given a hearing than at the end of the Clinton administration, including, by the way, John Roberts and Dennis Shedd. John Roberts, who has not even been given a hearing after 520 days, was really nominated about 10 years ago and renominated, of course, by George W. Bush.

But if you factor all four of those things out, the percentage that Ralph Neas gives is really meaningless. The fairness point is how long does the average court of appeals nominee wait for Senate action, and those statistics are just undeniably bad.

Mr. CHABOT. And the numbers you mentioned were 500 days now compared to, say, back in the Reagan administration, 35 days.

Mr. GAZIANO. That is right. It did pick up in Bush I to something like——

Mr. CHABOT. And Senator Leahy had proposed that a reasonable period of time would be like 60 days.

Mr. GAZIANO. And I should also add in 1997 and again in 1998, in different statements when he is proposing this legislation, he described vacancy rates that were much lower, including much lower on the courts of appeals. There were about 22 court of appeals vacancies then. He described that as a judicial vacancy crisis that endangered the administration of justice, and by his own standards, it was so then, it is even worse now.

Mr. CHABOT. Mr. Eastman, let me turn to you. At a March 14, 2002, press conference, Senator Daschle rejected the President's request to allow the full Senate to vote on the nomination of Charles Pickering to the fifth circuit because he said that doing so would

"break a 200-year-old precedent." The precedent to which Senator Daschle referred to is unclear. In your estimation is there any room for doubt under article II, section 2 of the Constitution that it is the role of the full Senate to confirm the President's judicial nominees?

And secondly, Federalist Paper No. 76 states that the President is bound to submit the propriety of his choice to the discussion and determination of an entire branch of the Legislature. What does "the entire branch of the Legislature" mean, and what bearing does this have on your interpretation of article II, section 2?

Mr. EASTMAN. The power in article II is clearly to the entire branch, the entire Senate, and it is not a power simply to confirm. They do have the power to reject the confirmation as well. But they are obligated to take some action so if the President's nominee is rejected, the President can rename a nominee. To do otherwise is to shift the appointment power away from the President to Committees in the Senate or, worse, to individual Members in the Senate. It is to create a national power and give it to a single Senator. That the Founders never contemplated and envisioned.

And I don't know what Senator Daschle's precedent that he is referring to either is. It doesn't exist. The power that is given in article II is to the Senate as a body, and it is an obligation. It is just not a discretionary power.

Mr. CHABOT. Thank you very much.

I want to ask another question. I have 2 seconds, and the light is ready to go off. At this time I recognize the gentleman from Virginia, Mr. Scott, for the purpose of asking questions for 5 minutes.

Mr. SCOTT. Mr. Gaziano, you mentioned that infamous Pledge case. Who appointed the judge that wrote the case?

Mr. GAZIANO. It was a Republican nominee, I am not sure who, and the judge has since withdrawn his support for that opinion, I should add.

Mr. SCOTT. It was a Republican President who appointed the judge?

Mr. GAZIANO. Yes. I remember reading that.

My point was that the jurisprudence of a circuit is skewed, though, when senior judges are sitting as a majority on a panel regardless of the precedent.

Mr. SCOTT. You have answered the question. I have other questions.

Somebody mentioned the right wing—the left wing does research on nominees, and the right wing doesn't do research on nominees. I want to ask a question. I want to point out the right wing didn't have to do research on many nominees during the Clinton period because no hearings were ever held. Can anybody explain to me how many hearings were held on fourth and tenth circuit nominees during the Clinton administration? How many hearings were held on President Clinton's fourth circuit nominees? And he had at least one judge pending for at least—for 6 consecutive years, at least somebody was pending during that entire time.

Mr. EASTMAN. I was a law clerk in the fourth circuit during that period of time, and I can tell you that two of the Clinton nominees were actually confirmed to the bench, Diana Motz from Maryland

and Blaine Michael from West Virginia. There were clearly hearings, and the notion that there were no hearings is simply false.

Mr. SCOTT. In the last 6 years?

Mr. EASTMAN. We can play the tit for tat game and ask—you can go back and ask Terry Boyle what happened in the 1990's. The point of the issue is if you want to take out a single example rather than the overall lockstep change in the policy that is occurring——

Mr. SCOTT. He had two judges from North Carolina——

Mr. EASTMAN. And Roger Gregory is now sitting on the bench, Mr. Congressman.

Mr. GAZIANO. I would add if there were injustices done, this President in an act of goodwill renominated the recess appointee from Virginia, Gregory, and he is now sitting on the court. So this President has worked mightily.

Mr. SCOTT. When the Republicans controlled the Senate, did any of the African American nominees ever get a hearing? No.

Mr. GAZIANO. I don't know. But in other circuits I know that they did.

Mr. SCOTT. Roger Gregory had gotten a hearing when the Democrats had taken over.

Mr. GAZIANO. After President Bush nominated him.

Mr. SCOTT. The Clinton nominees, African Americans appointed by Clinton never got a hearing; isn't that right?

Mr. GAZIANO. That is not true across the Nation.

Mr. SCOTT. Fourth circuit.

Mr. GAZIANO. There was only one judge nominated in the fourth circuit, and regardless——

Mr. SCOTT. Is it your testimony that one African American was appointed to the fourth circuit by Clinton? Is that your testimony?

Mr. GAZIANO. I believe that he was——

Mr. SCOTT. I can name three. I can name three.

Mr. GAZIANO. Three nominees to the fourth circuit?

Mr. SCOTT. Gregory and another one from North Carolina, a district court judge.

Mr. GAZIANO. The one——

Mr. SCOTT. Never a hearing. If you call them up and you state your reasons and defeat them, that is one thing. Never a hearing.

Mr. GAZIANO. How late were the others nominated?

Mr. SCOTT. There was somebody pending.

Mr. GAZIANO. Did they have home State Senate support at that time?

Mr. SCOTT. Never a hearing.

Mr. GAZIANO. That is an important process in the Senate. You may object to it.

Mr. SCOTT. What about the tenth circuit?

Mr. GAZIANO. I don't know.

Mr. SCOTT. President Bush came in and rejected the role of the ABA. The Senators want the ABA information. Usually that information is available when the appointment is made. Is that one of the reasons for holding things up?

Mr. EASTMAN. Let me address that, Congressman. The ABA's reports on Michael McConnell and on John Roberts and on Miguel Estrada, all of whom received well qualified ratings, were within

60 days of the nominations. That doesn't account for the last nearly year and a half of delay in holding hearings or Committee votes.

[9:58 a.m.]

Mr. SCOTT. So it did have something to do with hold-up. Let me just make one other comment.

Mr. EASTMAN. No, you did not characterize my statement. It did not have anything to do with the year and a half in delays and hold-up.

Mr. SCOTT. It had something to do with the hold-up.

Mr. EASTMAN. No, sir. None. A year and a half after later——

Mr. SCOTT. Sixty days.

Mr. EASTMAN. A year and a half after their report was in does not account for the hold-up.

Mr. SCOTT. Let me ask one other question. You have indicated a dislike for confirming judges based on ideology. How does it work if the President is appointing someone solely for ideology? Is the Senate not supposed to look at the ideology of a candidate?

Mr. EASTMAN. I addressed this, Congressman, at length in my prepared testimony. And it is very important. I do think ideology plays a role. If you ask a nominee will they fullfil their oath to defend the Constitution, or will they impose their personal predilections from the bench, and the answer is they would impose their personal predilections, it is my view that that is a disqualifying statement of ideology.

What you are talking about is something completely different. You are objecting to people who have demonstrated a commitment to the rule of law and to fulfilling their oaths of office from the bench. That is not an improper use—that is not a proper use of ideology in a refusal to confirm nominees.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Alabama, Mr. Bachus, is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman.

Mr. CHABOT. Yes.

Mr. SCOTT. Could I state one thing for the record? The other judge that I mentioned was James Beatty from the Middle District of North Carolina, who never had a hearing.

Mr. CHABOT. So noted.

The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you.

Dr. Eastman, this past March, Senator Daschle held a press conference and rejected President Bush's request that the full Senate vote on the nomination of Charles Pickering to the fifth circuit. And the reason that Senator Daschle gave for not having a vote of the full Senate is he said it would break a 200-year precedent. The precedent to which Senator Daschle refers to I am not aware of. But in your estimate, is there such a precedent, or is there any room for doubt under article II, section 2 of the Constitution that it is the role of the full Senate to confirm the President's judicial nominees? I mean, that was my understanding from constitutional law.

Mr. EASTMAN. Mr. Bachus, I think article II is pretty clear: The power—the advice and consent power is a check on the President's preemptive primary role in appointing judges. And it is a power

that is to be exercised by the entire Senate, not by an individual Senator and not by individual Committees.

What we have here—and I don't want to discount the role of the Committee process or the Committee in the overall process—but when a Committee declines to pass somebody out to the full Senate who lacks majority support, and it is clear that the nomination is not going to be confirmed, I would not say that that violates the Constitution. But we have got something here that is completely different. We have in fact the Senate Judiciary Committee refusing to report out people precisely because they have Majority support in the United States Senate. And I think that is an abuse of the advice and consent role, and that is a violation of article II.

Mr. BACHUS. I will read to you Federalist Paper No. 76, and ask you if this has anything to do with the issue. It states that the President is, and I quote, "bound to submit the priority of his choice to the discussion and determination of an entire branch of the legislature."

What does the entire branch of the legislature mean? And what bearing does this have on your interpretation of article II, section 2?

Mr. EASTMAN. Well, Alexander Hamilton, when he wrote that Federalist Paper, clearly was referring to the entire United States Senate. And I think there is no dispute that the text of the Constitution gives the advice and consent power, a power to check the President, to the entire Senate, not to individual Members. And I would say that one of the problems with the blue-slip policy, for example, that developed in the Senate out of senatorial courtesy was that it gives a single Senator the ability essentially to veto a judicial nominee. It is bad enough when that power is exercised by home State Senators for nominees in their home State. The presumption was that they had their own sources of information about the character of that candidate.

But when you expand the blue-slip policy, as we have done recently, to let a single Senator essentially veto any nominee from anywhere in the circuit, the natural limits to the blue-slip policy that the President could just appoint somebody from another State are gone. And without the limits on that policy, I think you have seen the abuse of the policy, particularly in the Sixth Circuit Court of Appeals.

Mr. BACHUS. Thank you.

Mr. Neas, I was just sort of writing down some of what you said. You said there are too many right-wing nominees, and you said there ought to be more left-wing nominees.

Mr. NEAS. I think it was more moderate, I believe.

Mr. BACHUS. Okay. So they need to be—you can't appoint right-wingers or left-wingers? They have to be moderates? Is that——

Mr. NEAS. The President, of course, can nominate whoever he wants to nominate. But if he takes ideology into account, certainly the Senate for the last 200 years has also taken ideology into account.

What I mean by right-wing, by the way, Mr. Bachus, is that if you recall, in November and December 1999 and throughout 2000, George W. Bush said, "Listen, my favorite judges are Scalia and Thomas."

Now, those are two excellent examples of some—what I would consider to be, a right-wing judge; someone who, like several people on this panel, would like to go back to before the New Deal and overturn 65 years of precedents.

Mr. BACHUS. Would you say that both those gentlemen are unqualified to serve in their positions which they now serve in?

Mr. NEAS. I think both individuals have certain qualifications, as the A B A——

Mr. BACHUS. No. I mean, do you think they are qualified to serve? They are serving. I mean, can you answer that question?

Mr. NEAS. If they were up for confirmation, I would say they were not qualified, if you looked at qualifications that the Senate I believe should look at.

Mr. BACHUS. Neither of those gentlemen, although they are on the Supreme Court today, in your opinion, neither are qualified to be there?

Mr. NEAS. As I said, there are more factors that one looks at when looking at whether one is qualified for a judicial nomination than just having certainly legal skills.

Mr. BACHUS. Well, is that a yes or no?

Mr. NEAS. I would also consider having many other criteria that one looks at. Yes.

Mr. BACHUS. That was a yes, they are qualified to serve?

Mr. NEAS. I think I made myself clear.

Mr. BACHUS. Is—what now?

Mr. NEAS. I said, when looking at qualifications, legal skills or credentials are two criteria we look at. I would also look at other criteria, like a demonstrated commitment to equal justice under the law.

Mr. BACHUS. Let me ask you this. Here, are you talking about your beliefs——

Mr. CHABOT. The gentleman's time has expired. If you want to wrap it up.

Mr. BACHUS. You know, when the Congress stood on the Capitol steps and sang God Bless America, did you consider that an appropriate action?

Mr. NEAS. I have sung God Bless America many times, including right after 9/11. And, quite frankly, there are certain kinds of actions that I call ceremonial deism. And, quite frankly, I have no problem with you or anyone else going on the steps of the Capitol and singing God Bless America.

Mr. BACHUS. So that was appropriate?

Mr. NEAS. Again, I have no problem with certain people saying—perhaps it is not a great idea for elected officials to use Government property to go and sing something that might be considered by some—I am not one of those who would make that determination, and I don't think it was inappropriate.

Mr. BACHUS. But you, yourself, thought it was appropriate?

Mr. NEAS. I thought it was appropriate. Yes.

Mr. CHABOT. The gentleman's time has expired.

I would ask unanimous consent that the gentlelady from Texas, Ms. Jackson Lee, who is a Member of the Judiciary Committee but not a Member of this Committee, be granted 5 minutes to ask questions.

Without objection, the gentlelady is recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, I cannot thank you enough for your graciousness. Thank you very much to the Committee Members as well. I thank the witnesses very much for their presence here this morning. I simply have just a very brief question to Mr. Gaziano, if I have the name pronounced correctly.

Mr. GAZIANO. Close. Close enough.

Ms. JACKSON LEE. Thank you very much, sir. Just a simple question, yes or no. You are opposed—or do you believe there is politicizing of judicial appointments? Do you believe there is politicizing of judicial appointments?

Mr. GAZIANO. The Senate has politicized them. The White House counsels from a number of Presidents have flatly refuted what Mr. Neas has said, that they took political ideology into account.

Ms. JACKSON LEE. But you believe the Senate has.

Mr. GAZIANO. The Senate has from time to time. And it shouldn't take political ideology into account. It should look at judicial—I refer to the type of ideology that Professor Eastman referred to as judicial philosophy. That is okay for someone to look at, but not political ideology in and of itself.

Ms. JACKSON LEE. Let me appreciate very much that response. And I am going to take just the narrowness of it, of politicizing, because we may both agree on that particular point. And for that reason, I have a series of questions I would like to pose to Mr. Neas, and I would like to lay the groundwork, because I am caught in betwixt and in between, coming from the State of Texas having great need.

Let me suggest to you certain facts. Ron Clark, State representative Ron Clark, Republican nominee for State representative, was confirmed for a judicial appointment October 2, 2002. Ron Clark is a Republican. Ron Clark was supported by Texans, both Democrats and Republicans, for this particular position, again, depoliticizing the issue of need.

According to the reports that have come to my attention, Ron Clark now has asked for a 6-month delay in the signing of his commission by the President of the United States. Recently, the Administrative Office of the U.S. Courts, September 24, 2002, has noted a 30 percent growth in Federal cases. In particular, the Eastern District of Texas was granted most recently a temporary court because 3,000 cases are backlogged. Since 1999, 146 judges have been confirmed, and the commission for each was signed by the President within 7 days.

Now, with the dramatic need—and let me applaud the Senate, if you will, for responding to bipartisan support and the recognition of Mr. Clark's ability to serve on the Federal bench—which I think is an extremely high honor—the great need that we have in the Eastern District, coming from Texas, being a former associate municipal court judge, recognizing that even as I took that position as a city court judge, that I was precluded from political activities.

I note also in an article Friday, October 4, 2002, it indicated that Mr. Ross is still focused on his State legislative house race as a Republican.

Mr. Neas, what would be your assessment, with the crisis of the judiciary as we understand from Supreme Court Justice—Chief

Justice Rehnquist's backdrop to this hearing in terms of politicizing, and noting that this individual was approved by the United States Senate, obviously, the leadership in the hands of the Democrats, and then the individual now asking for a 6-month delay to participate in the house race, and then continue to serve politically as a Republican in that manner? I ask—pose the question to the gentleman.

Ms. NEAS. Congresswoman, I hadn't heard about this until you brought it up this morning. It does seem to be a rather unusual, quite surprising, disturbing politicization of the process. It might also raise some interesting ethical issues. Again, this is my first impression. But I am quite surprised that someone would do that.

Ms. JACKSON LEE. Any other—Dr. Eastman?

Mr. EASTMAN. I too—it is the first I have heard of it. But, you know, to try and attribute that to the politicization of the White House in this process seems to me to be a non sequitur. The individual may——

Ms. JACKSON LEE. You would want to, in light of the great need in the Eastern District, you would think that the President would follow protocol and sign his commission so that he could ascend to the bench. I think that would certainly depoliticize and leave no room for doubt. Would it be appropriate for the President to move forward and sign his commission?

Mr. EASTMAN. You know, I am not going to comment on something I don't know anything about.

Mr. CHABOT. The gentlelady's time has expired. The gentlelady from Pennsylvania is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman.

Mr. Neas, Mr. Bachus actually asked you a little bit about this, but one thing he didn't ask that I would like some clarification on: In your testimony you talk about nominees who should be, and I quote, "more moderate, mainstream nominees who reflect genuine bipartisan consultation."

Could you define "more moderate, mainstream" for me?

Mr. NEAS. Yes. As I explained in part to the Congressman, we believe that the right has as its principle objective total ideological control of the Federal judiciary, Supreme Court and the lower courts, and that the President has nominated a number of individuals who we believe share the right-wing judicial philosophy of the Clarence Thomases and the Antonin Scalias.

And our advice to the President and to Members of the Senate would be not to appoint more in the mode of Scalia and Thomas, but more moderate and more mainstream judges.

Ms. HART. Okay. So you are asking for people who are not pro-life, people who are pro-*Roe* v. *Wade*. You are asking for an ideology.

Mr. NEAS. What I am asking for is to have judges who do not share the judicial philosophy of people like Michael Luttig or Edith Jones, who share the philosophy of Thomas and Scalia, who really want to go back 65 years and basically overturn approximately 100 Supreme Court precedents that would undermine what the law has been for a long time on civil rights, reproductive rights and privacy, the environment, and many, many issues. There is no litmus test. We are talking about a judicial philosophy.

Ms. HART. Mr. Neas, the Supreme Court is charged with ultimately challenging or answering challenges and overturning laws when they are wrong. It has done that historically. If the members of the Supreme Court are not willing to push the envelope and ask the question, what do you expect them to do?

Mr. NEAS. Congresswoman, what I would hope and I think the debate today, over the last several years, going back really the entire history of our country, will be over what kind of Supreme Court Justice do we want. I want our Supreme Court Justices, I want Supreme Court Justices who do believe that the judicial philosophy that has been in place since about 1937 is a judicial philosophy that should continue.

I would oppose right-wing jurists who would do everything possible to revisit them and to overturn them.

Ms. HART. And you would oppose left-wing jurists?

Mr. NEAS. Pardon me?

Ms. HART. Would you also opposed a left-wing jurist?

Mr. NEAS. I am not sure what you would define as a left-wing jurist.

Ms. HART. So you are asking for a specific ideology.

Mr. NEAS. If I may answer. If the left-wing jurist agrees with the fundamental civil rights decisions, civil liberty decisions, environmental decisions, and religious liberty decisions going back to 1937 or so, I would support such a nominee.

Ms. HART. Okay. That is clear.

Ms. DALY. Congresswoman, if I could interject.

Ms. HART. Sure.

Ms. DALY. I think that Mr. Neas will not be satisfied until the ninth circuit is reflected in all of our courts, the most overturned court in our Nation.

Ms. HART. You may be right with that last answer.

Does anyone else on our panel believe that there should be a certain ideology sought in the judicial nominations process?

Mr. EASTMAN. Congresswoman, I do. And I think the ideology is one spelled out in the Federalist Papers. The primary role of the judiciary is to interpret, not to make the law. And the ideology Mr. Neas is proffering is over the last 65 years a Supreme Court that has bent and reshaped the Constitution to its own will, has signed off onto excesses of claims of powers by this body, by the Congress of the United States, and has refused to fullfil its primary obligation to keep the political branches within the bounds of the Constitution itself.

When you have a judiciary that will not play that fundamental role, you end up with political branches believing that the Constitution does not impose checks on their power, that provides them unlimited sources of power rather than specific enumerations and delegations of power. And we cease to live in the constitution of Government that the founders bequeathed to us.

What Justices Thomas and Scalia and the judges who have followed the rule of law in their wake do is interpret, not make the law. That is the kind of ideological question that ought to be asked. And during the——

Ms. HART. So—before you go on. So when you talk about ideology, you don't mean as far as positions on issues that have been heard or dealt with by the Court.

Mr. EASTMAN. No, ma'am.

Ms. HART. When you say judicial philosophy, you mean——

Mr. EASTMAN. Judicial philosophy.

Ms. HART [continuing]. Judicial philosophy.

Mr. EASTMAN. That is right. I mean fulfilling the obligation of the oath of office, which is to interpret, not to make the law. And to keep the political branches within the bounds of the powers assigned to them by striking down laws, not that simply are unwise, but that are in fact unconstitutional because they exceed the powers granted to the Congress.

Ms. HART. I see my time has expired. Thank you. I yield back.

Mr. CHABOT. I thank the gentlelady for her questions. I thank all the panel for their questions. And I particularly want to thank the witnesses here this morning for their testimony. I thought this was very helpful, very enlightening for the Members that were here.

Members who were not able to make it will be able to review the testimony here today. I think the Federal judiciary vacancy crisis is one of the most significant crises that Government in general has facing it here in Washington. It has gotten too little attention. And you have helped to elevate the awareness of this body and the impact that it can have on the courts. So I thank you very much for that contribution.

Mr. SCOTT. Mr. Chairman.

Mr. CHABOT. And Mr. Scott has a unanimous consent request.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks and submit additional materials for the record.

Mr. CHABOT. Without objection.

Mr. SCOTT. And Mr. Chairman, I would also want the transcript of this hearing preserved so that when the next Democratic President has a Republican Senate, we won't have to have the hearing, we can just reproduce the testimony.

Mr. CHABOT. We will have it preserved. I would not stipulate, however, that there will ever come that.

Ms. JACKSON LEE. Mr. Chairman.

Mr. CHABOT. Hopefully at least not in my lifetime. The gentlelady from Texas is recognized.

Ms. JACKSON LEE. Mr. Chairman, all things may be possible. But I would ask, as I guess on my unanimous consent time, to be allowed to submit an article from the Herald Democrat in Texas, Friday, October 4, 2002, into the record.

Mr. CHABOT. Without objection.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. CHABOT. Again, we thank the panel for being here this morning. And with no further business to come before the Committee, we are adjourned.

[Whereupon, at 10:19 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

March 21, 2002

The Honorable Tom Daschle
Majority Leader
United States Senate
825 Hart Senate Office Building
Washington, DC 20510

Dear Senator Daschle,

President Bush has asked you to allow the full Senate to vote on the nomination of U.S. District Judge Charles W. Pickering to a seat on the Court of Appeals for the Fifth Circuit despite the refusal of the Senate Judiciary Committee's 10 Democratic members to vote the nomination out to the full Senate. At a March 14, 2002, press conference, you rejected the President's request because doing so, you said, would "break a 200-year-old precedent."

The precedent to which you refer is unclear. The Constitution, however, is not.

Article II, Section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the *Senate*, shall appoint ... Judges of the supreme Court, and all other Officers of the United States ...."

If there were any room for doubt regarding the role of the *full* Senate in confirming the President's judicial nominees, Alexander Hamilton, in Federalist Paper No. 76, makes clear that the President is "bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body *an entire branch of the legislature*." Indeed, Hamilton elsewhere and repeatedly refers to the Senate's role in approving judicial nominees as involving the "whole body" of the Senate and, in Federalist Paper No. 77, as requiring the judgment of, again, "an entire branch of the legislature."

The Honorable Tom Daschle
Majority Leader
United States Senate
825 Hart Senate Office Building
Washington, DC 20510

Senate, Senate Judiciary Committee Chairman Patrick Leahy was quoted as saying "We have made the Constitution work and we made this committee work." However, granting a committee of a much larger legislative body the final decision on nominations was explicitly rejected by the Founding Fathers. For example, while the States considered ratifying the federal constitution, final approval of nominations by the governor of New York rested with a small council consisting of a handful of persons. That approach was singled out for the strongest of criticisms in Federalist Paper No. 77, in which Hamilton warned that, under such a regime, "[e]very mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope."

Further, the Senate adopted the following resolution in 1789 for addressing presidential nominations:

> Resolved, That when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration .... [A]ll questions shall be put by the President of the Senate ... and the Senators shall signify their assent or dissent by answering, viva voce, ay or no.
>
> 1 Exec. J. 19.

This resolution, so early on in the Senate's existence, embodied the strong commitment the Senate once had to fulfill its constitutional role by bringing presidential nominations before the full body of the Senate for a vote. Modern scholarly observers have also long supported this principle. Harvard Law School Professor Laurence Tribe, for example, at page 131 of his book *God Save This Honorable Court* (1985) has written that "what matters most is that one hundred Senators, of diverse backgrounds and philosophies" vote on the confirmation of judicial nominees.

With the Constitution and the wisdom of the Founding Father in mind, I urge you to bring the President's judicial nominees to the floor of the Senate for a vote by the entire body.

Sincerely,

Steve Chabot
Chairman
Subcommittee on the Constitution

PREPARED STATEMENT OF CHIEF JUDGE DOUGLAS H. GINSBURG FOR THE 2002 D.C. CIRCUIT JUDICIAL CONFERENCE

I am pleased to welcome you all to the 59th Judicial Conference of the D.C. Circuit, and the first at which I appear in the capacity of Chief Judge. Like you, I look forward to the events of the next few days, as well as to the many challenges that face the court in the years to come.

Before we get started, I would like to welcome the new judges of the D.C. Circuit, who are attending their first Circuit Conference. Although we do not have any new Court of Appeals judges—more to follow on that later—I would like to welcome District Judges Reggie Walton, John Bates, and Richard Leon. It is a great benefit to have you as members of the district bench.

In setting the goals for my term as Chief Judge, I recognized that several of my priorities are the same as those Judge Edwards established during his very successful tenure as Chief Judge. Things such as maintaining collegial relations among the judges in the Circuit, ensuring that the court's automation services are "state of the art", and developing strong training and evaluation programs for all staff functions are crucial to the mission of the court. In addition to these ongoing objectives, my primary focus over the next few years necessarily will be the construction of the new courthouse annex. The official groundbreaking for the annex occurred on April 8, 2002 at a ceremony held in front of the courthouse. We had a distinguished panel of speakers including Vice President Cheney and Chief Justice Rehnquist. As you may have seen, the initial stage of construction has begun. The excavation for the garage will be the next big step before full site excavation. The two and a half years of construction will be followed by renovation of the existing building for an additional two and a half to three years.

Since last we gathered two years ago, a great deal has happened in the Court of Appeals—most of it in the last nine months. The first major event of the biennium was the celebration marking the Circuit's 200th year of service to the District of Columbia and to the Nation. On March 8 and 9 of last year the Historical Society of the District of Columbia Circuit, chaired by Judge Louis F. Oberdorfer, sponsored an excellent symposium of addresses and panel discussions. The Executive Director of the bicentennial symposium, our former Circuit Executive Linda Ferren, helped oversee all of the logistics for that event. The symposium, held in the courthouse and in the Ronald Reagan International Trade Center, included a Keynote speech by our beloved alumna, Justice Ruth Bader Ginsburg, about the importance of the bicentennial celebration; a tribute to the U.S. District Court; a luncheon address by Chief Justice William H. Rehnquist; and four panel discussions.

Undoubtedly the most noted case of the last two years was Microsoft. These consolidated appeals were not ordinary cases and they presented a myriad of special case management challenges. Web pages on the court's Internet site were designed to make electronic versions of all docketed materials, as well as communications from the court, available to the parties and public in real time. The parties used an electronic case filing system that essentially allowed them to file and to docket their own pleadings. Interested parties could receive e-mail notification of new pleadings through a link on the court's web site. The parties also filed their briefs in CD-Rom format with hyperlinks to every case, statute, or other document cited in the briefs. The aspect that proved technologically the most challenging was the live audio feed of the argument that was broadcast via the pool lines of the major networks and streamed onto the Internet. But, in the end, the argument went smoothly and it was heard live around the country.

Finally, in the wake of the terrorist attacks of last September 11, the court has had to change many of its internal operating procedures in order to be more attentive to safety and security concerns. Everything from mail deliveries to emergency contingency plans have been reviewed. In addition, as a result of the anthrax scare, the Supreme Court put into action the contingency understanding with our court, and moved several of its October 2001 arguments to our courthouse. This was an historic event because it was the only time the High Court has heard arguments outside the Supreme Court building since it opened in 1935.

I cannot conclude my remarks without noting the significant changes that have occurred over the last few years in the composition of the court of appeals. Although authorized by statute to have 12 active judges, the Court of Appeals now has only eight active judges—myself and Judges Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland. Judges Silberman and Williams have taken senior status in the two years since our last Circuit Conference. The court has not been down to eight active judges since 1980. While there are two nominations pending before the Senate, they have been pending for more than 13 months, and it is still unclear when and even whether they will be acted upon. It is clear, however, that if the

court does not have additional judges soon, our ability to manage our workload in a timely fashion will be seriously compromised.

Indeed, in the Term just ending, the court had to cancel some days of oral argument. Cases that would have been heard on those days will not be heard until next September. For the upcoming term, the court has been compelled to adopt an argument calendar for only eight full-time judges and our part-time senior judges, whose combined service is the equivalent of one full-time judge. Over the nine months the court hears oral arguments, the court will hear cases on only 96 days and will be able to schedule only 336 cases. Were the court to have the services of the two pending nominees for next term, we could add about 20 sitting days and schedule about 75 more cases; with three additional judges we could add 30 sitting days and schedule more than 110 additional cases. Because of the limited number of sitting days, the 2002–03 term argument calendar is already nearly full through March 2003—an alarming prospect for litigants now in the District Court.

Finally, each active judge on the Court of Appeals (except the Chief) is ordinarily assigned to a special panel for hearing emergency cases and all manner of motions for up to 16 weeks over the course of the calendar year. This duty is over and above the judges' argument calendar. With only seven judges now available for special panels, each of them is serving 6 weeks of "overtime" emergency duty. Indeed, we have often been forced to constitute emergency panels of fewer than three judges because of vacancies on the court. If even two more judges were available, all such "overtime" would be eliminated and each emergency panel would have its full complement of three judges. Thus, it is clear that the Senate's inaction is coming to jeopardize the administration of justice in this Circuit.

Finally, before we begin with the business of the Conference I want to recognize the Arrangement's Committee for this Conference, which was chaired by Chief Judge Hogan, and included Circuit Judges Sentelle, Rogers, and Silberman, District Judge Huvelle, Professor Julie Rose O'Sullivan, and attorneys Dwight D. Murray, George W. Jones, Jr., Kevin T. Baine, and Daniel M. Armstrong. The Committee, along with Circuit Executive Jill Sayenga and Conference Planner Maureen Grant, has put together what should be a very interesting program. I would like also to thank Chief Justice William H. Rehnquist who will be appearing with Judge Patricia M. Wald on Friday morning to discuss issues related to international and military tribunals.

I cannot close without recognizing the Court of Appeals mediators who are here. These men and women, all distinguished members of the Bar, mediate cases for the Court on a volunteer basis. The nature of our docket is such that many of the cases they handle are large, complex administrative appeals that require a great deal of effort if they are to be resolved by consensus; indeed, all the cases that are mediated—large and small—are time-consuming. The Mediation Program has now been in operation for nearly 13 years. We owe the panel, as well as its distinguished chairman, John H. Pickering, Esq., our continuing thanks for their pro bono work on these cases.

It is now my pleasure to introduce the Chief Judge of the District Court, the Honorable Thomas F. Hogan, who will give the report of the District Court.

PRODEDURAL APPENDIX TO JUDGE BOGGS' DISSENT

Although the following procedural matters do not directly affect the legal principles discussed in this case, it is important that they be placed in the record as an explanation of the manner in which this case came before the particular decision-making body that has now decided it. Since a person reading these opinions in sequential order will have read a variety of complicated responses attempting to defend what happened procedurally in this case, it may be well to begin with the plainest possible statement of undisputed primary facts. The panel that considered this case prior to, and certainly following, the filing of the present appeals was not constituted in conformity with 6th Cir. I.O.P. 34(b)(2) of this court's rules, or any other rule. A motion that counsel made on May 14, 2001, for initial hearing *en banc* was not transmitted to most members of the court for five months, and was not treated as stated in the court's order of June 4, 2001. These facts speak for themselves, however each of us may choose to characterize them.

The appeals regarding the Law School's admissions program that we have today decided were filed as follows: case number 01–1447 on April 2, 2001, and case number 01–1516 on April 18, 2001.

Under this court's rules, these cases generally would have been assigned to a panel chosen at random. *See* 6th Cir. I.O.P. 34(b)(1). This was not done. Instead,

as a result of a series of decisions in contravention of our rules and policies, we arrived at the present configuration.

In August 1999, a panel of this court, consisting of Circuit Judges Daughtrey and Moore and visiting Senior District Judge Stafford, in case number 98–2009, decided an appeal concerning the rights of certain parties to intervene in the district court case underlying the current appeal, but did not address the merits of the case. *See Grutter* v. *Bollinger*, 188 F.3d 394 (6th Cir. 1999).

Upon the filing of the instant appeals, a question could have arisen regarding whether these appeals, seeking review of cases already returned to the district court by a panel of this court, were "must panel" cases. *See* 6th Cir. I.O.P. 34(b)(2). It is absolutely clear that the applicable procedures for potential "must panel" cases were not followed to determine whether and how these cases should be heard as a "must panel."

If a panel has "returned a case to the district court for further proceedings" and another *appeal* has been taken from those further proceedings, the original panel "determine[s] whether the second appeal should be submitted to it for decision, or assigned to a panel at random." *Ibid.* If a district judge, as in this case, was on the original panel, the remaining two circuit judges from the original panel are required to decide whether the district judge should be recalled for the panel or whether a third circuit judge "should be drawn to fill out the panel; provided that, if oral argument is scheduled, the draw shall be made from the judges of this Court scheduled to sit at that time." *Ibid.* These procedures were not followed in this case.

While these cases were before the district court, several interlocutory motions were, in the usual course of our policies, referred to a weekly motions panel chosen at random. However, even though no second appeal had been filed, the motions were then redirected to the earlier panel, which had been augmented, at the direction of the Chief Judge, by the addition of the Chief Judge, not a randomly chosen judge. Following the filing of the current appeals, all further actions regarding those appeals, including a motion to stay the district court's order, were handled by this preselected panel.

This was the situation when, on May 14, 2001, counsel petitioned the entire court, pursuant to Fed. R. App. P. 35(b)(1)(B), asking that the cases be heard by the *en banc* court in the first instance. At this point, the *en banc* court consisted of eleven active judges: the nine judges who ultimately heard this case plus then-active Judges Norris and Suhrheinrich. The petition was not circulated to the entire court.

Instead, on June 4, 2001, an order was issued, at the direction of the Chief Judge and in the name of the court, stating that the motion "c[ame] before *the court*," but holding the petition for hearing en banc in abeyance "until such time as the briefs of the parties have been filed, after which *the court* will make a determination on whether the cases *should be submitted to a three-judge panel* for adjudication or be referred to the en banc court." (emphasis added). This order was also not circulated to the *en banc* court. The Appellee's proof brief was filed on June 18, 2001. The petition was still not circulated to the court. On July 1, Judge Norris took senior status. All briefing in the case was certainly completed by July 30, 2001. Even still, the petition was not circulated to the court. On August 15, Judge Suhrheinrich took senior status. The petition was still not circulated to the court. On August 23, 2001, according to our internal docket, the petition was "referred" to the specially constituted panel. I have no reason to doubt that Judges Moore and Daughtrey had not known of the petition prior to that time. The special panel still did not circulate the petition for an *en banc* hearing to the full court.

Rather than circulating the still pending petition, the special panel scheduled the case for oral argument before itself, and again not a normally selected panel. According to the order, issued August 27, oral argument was to be held on October 23, fifty-seven days away. Forty-nine of those fifty-seven days passed, with no action being taken to circulate the still pending petition for hearing *en banc*, even though all briefing certainly had been completed. Suddenly, with the panel hearing just eight days away, a decision was made finally to circulate the pending petition to the nine active judges of our court. The petition was circulated without any explanation for the delay, and without even any notation that a delay had occurred. In addition, the statement accompanying the circulation neither recommended an *en banc* hearing nor indicated why the issue was raised, *at that time*, as opposed to a time more proximate to the filing of the petition, though it did state that the full court was being advised because "a question . . . has been raised regarding the composition of the panel." In any event, sufficient members of the active court voted to have the case heard *en banc*, and an order was issued on October 19, 2001, canceling the panel hearing scheduled to occur in only four days and instituting an *en banc* hearing before the now-reduced court.

Judge Moore's concurrence makes several remarkable points. She first notes that the irregular constitution of the panel can be excused because "Chief Judge Martin has frequently substituted himself in a variety of matters, of varying degrees of importance, throughout his tenure as chief judge, in order to avoid inconveniencing other circuit judges." Concurring Op. at 26 (Moore). But, of course, the very point is that such a practice, to the extent it exists, was unknown to the other members of the court, who had every reason to believe that the panel had been regularly constituted. There was no reason to know of the unusual handling of the motions in 2000. There was no reason to know that there was any relation between the constitution of the "must panel" in 2001 and the activities in 2000. And there was no reason to know that anything was going on that was not in strict conformity with 6th Cir. I.O.P. 34(b)(2). Thus, there was no reason to take any unusual action in response, whether before or after "April 5, 2001." Concurring Op. at 27.

Judge Moore also contends that the Chief Judge regularly fills "vacancies in other cases," that no one has previously objected to his practice, and that his practice has become "a matter of common knowledge among the judges of this court." Concurring Op. at 26. I absolutely deny that this judge has had *any* "knowledge" of, or that the Chief Judge has announced or admitted to, any such practice of inserting himself onto panels without a random draw.

The notion that other members of the court were in some way derelict in not *sua sponte* calling for an initial hearing *en banc* as soon as the appeal was filed is both remarkable and misses the point. Concurring Op. at 25–26, 27. There would be no particular reason for an initial hearing *en banc* unless there were some extraordinary circumstance, as the document Judge Moore has quoted obliquely indicates. Concurring Op. at 24–25.

I have been on the court for 16 years, and I do not recall an initial hearing *en banc* in my tenure. The concatenation of the irregular panel, the withholding, by whatever mechanism, of the motion addressed to the court, and the later granting of that motion in haste, are matters for which the other members of the court are certainly not responsible.

Judge Moore suggests that my objections to the composition of the three-judge panel are "minor" because the decisions regarding the composition did not "actually change[] the outcome of the present case." Concurring Op. at 24 n.5 (Moore). But as I have always made clear, it is difficult to know what body would have decided this case if the rules had been correctly implemented. Further, to the extent that the Judge Moore claims that the irregularities in the hearing panel's composition were the only reason for granting the *en banc* petition, those irregularities existed at the time the petition was filed, and thus it is difficult also to argue that they did not affect the composition of the panel that ultimately decided this case. Most importantly, however, the rights of litigants and the members of this court to scrupulous compliance with the rules are not dependent on the likely—or even certain—substantive outcomes of particular matters before the court.

Contrary to Judge Moore's concurring opinion, I do not contend that the legal opinions of any member of this court do not represent that judge's principled judgment in this case. Concurring Op. at 21–22 (Moore). However, under these circumstances, it is impossible to say what the result would have been had this case been handled in accordance with our long-established rules. The case might have been heard before a different panel, or before a different *en banc* court.

The Washington Times

September 16, 2002, Monday, Final Edition

SECTION: OPED; SWEET LAND OF LIBERTY; Pg. A21

LENGTH: 829 words

HEADLINE: No independence on Senate Judiciary Committee;
Justice Priscilla Owen failed pro-choice litmus test

BYLINE: By **Nat Hentoff,** THE WASHINGTON TIMES

BODY:
Once again, the Senate Judiciary Committee has taken it upon itself to be the sole judge and jury of a presidential judicial nomination - rejecting, on 10-9 party-line vote, Texas Supreme Court Justice Priscilla Owen for the Fifth Circuit Court of Appeals.

Also rejected was a proposal to send the nomination to a full Senate vote, where there was a strong likelihood that she would be confirmed. I was particularly disappointed that Wisconsin Sen. Russ Feingold - the only senator with the constitutional courage to vote against the USA Patriot Act - joined the party-line vote on both counts.

My own judicial heroes have been Louis Brandeis, William O. Douglas, William Brennan and Hugo Black. I do not have a conservative bent in these matters. In this confrontation, I watched Justice Owen's hearing before the committee on C-SPAN and researched her rulings. I disagree with a number of her decisions, but I came to the same conclusion as a July 24 editorial in The Washington Post, hardly a bastion of conservatism, that "Justice Owen is indisputably well-qualified. . . She is still a conservative. And that is still not a good reason to vote her down." When the Bush administration decided to largely ignore the American Bar Association's ratings of judicial nominees, Democrats in the Senate were indignant because they wanted the ABA to continue to be involved. But here comes Priscilla Owen with a unanimous rating of "well-qualified" by the American Bar Association.

But when she was voted down by the Democratic majority on the Judiciary Committee, Senate Democratic Leader Tom Daschle of South Dakota, hardly a renowned constitutional scholar, said, "The message is this: We will confirm qualified judges. Don't send us unqualified people."

Justice Owen was attacked for her "ideological extremism" by members of the committee, who were bullying her, such as New York Sen. Charles Schumer. But their real message was that they wanted to be sure how she would vote on the Fifth Circuit on their own ideological priorities, such as teen-agers and abortion. Yet, her rulings on parental consent for teen-agers desiring abortions are, she told them, in line with Supreme Court decisions.

Moreover, national polls I've seen show a large majority of Americans in favor of parental consent for abortions. Yet, Democrats on the committee charged that Justice Owen is "out of the mainstream."

There were other objections, but as Nina Totenberg reported on National Public Radio, "Democrats put her abortion record front and center, portraying it as hostile to abortion rights."

When Republicans have been in the majority on the Judiciary Committee, they have also been arrogantly ideological and partisan. Continually ignored by both parties is Abraham Lincoln's insistence on judicial independence. When it comes to judicial nominees, said Lincoln, "We cannot ask what he will do, and if we should, and he would answer us, we should despise him for it."

There is only one answer to this continual disregard by the Judiciary Committee of what the Constitution says about the "advice and consent" role of the Senate in these crucial nominations.

That one answer was provided by Republican Sen. Arlen Specter of Pennsylvania, a member of the Judiciary Committee, in the July 8 Legal Times:

"Article II, Section 2, of the Constitution tells us that the president 'shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States' . . . Neither the text of the Constitution nor any contemporaneous or subsequent history says anything about the ability of one senator or one committee to defeat a judicial nomination by the president.

"To the contrary," Mr. Specter continued, "in the Federalist [Papers] 76, Alexander Hamilton made clear that this constitutional function was to be exercised by the Senate as a whole . . . If one senator or one committee has the de facto power to block a nomination, then the advice-and-consent clause of the Constitution is rendered virtually meaningless."

I do not expect either the pressure groups on both the right and the left to adhere to the clear mandate of the Constitution by demanding that the Senate change a rule that is only of its own making.

It is up to the president of any party to schedule an address to the American people on prime time television, and tell them how and why this serial contempt of the Constitution has been taking place for so long.

This is a test of bipartisan constitutional leadership for George W. Bush, who can do it now. If he fails to meet it, any future candidates for the presidency of the United States should be asked if they will demand an end to this cynical undermining of judicial independence by the Senate Judiciary Committee, no matter which party is in control.

Nat Hentoff's column for The Washington Times appears Mondays.

The Washington Post

August 09, 2002, Friday, Final Edition
SECTION: EDITORIAL; Pg. A22

LENGTH: 563 words

HEADLINE: Judicial Nominations Scorecard

BODY:

SINCE SEN. Patrick Leahy took over the Senate Judiciary Committee last year, a war of words -- and numbers -- has broken out among the Vermont Democrat, the White House and Senate Republicans over judicial nominations. Mr. Leahy claims to have restored honor and fairness to the judicial nominations process, while his critics claim he has led the obstructionist charge against the president's nominees. We have reserved judgment until now; the committee simply had not been under his control long enough to permit a reasonable comparison with past years. Now that Mr. Leahy has been in control for more than a year, however, a fair comparison is becoming possible. The story is decidedly mixed. By recent measures, Mr. Leahy has not done badly. The Senate has confirmed 72 nominees so far, including 13 court of appeals judges. Vacant judgeships are down substantially, from 110 when Mr. Leahy took over the committee to 77 now. Assuming the current pace is maintained, the 107th Congress should confirm judges at a pace consistent with that of the three preceding congresses. And while the number of appeals court judges confirmed seems low, this too is in keeping with recent practice. The 104th Congress confirmed only 11 circuit judges; the 105th, 20, and the 106th, 15. Mr. Leahy's aggregate numbers, in other words, look pretty good -- particularly since he took over the committee in midstream.

Yet this is only part of the story, the rest of which is less favorable to Mr. Leahy. President Bush has been unusually prompt in making nominations, and in recent years, there has been a certain deference paid to a president's nominees in the first two years of his term. President Reagan, for example, saw all but one of his 88 nominees confirmed in his initial two years. The elder President Bush, in a period of divided government similar to this one, saw 70 of his 74 nominees confirmed. And President Clinton got 126 of his 140 nominees acted upon -- a reminder that the Senate is capable of far swifter action than recent practice has permitted. By contrast, President Bush has seen only 59 percent of his 123 nominees confirmed.

More disturbing, the pernicious practice of letting nominees hang indefinitely is not improving. Eleven of Mr. Bush's circuit court nominees have waited more than a year for a hearing; none of the past three presidents saw any circuit court nominees suffer this indignity during his first two years in office. In fact, the White House points out that through the entirety of President Clinton's time in office, a total of 12 circuit court nominees were denied the courtesy of a hearing for more than a year -- only one more than Mr. Leahy has let dangle in just the first half of Mr. Bush's first

term. This figure is a little tricky, because some Clinton nominees got hearings and then sat around endlessly afterward. Still, the picture it paints is not a pretty one. And while Senate Republicans are being enormously hypocritical in howling about obstructionism -- having refined the art themselves -- it would constitute an unfortunate escalation if this trend went uncorrected. Mr. Leahy still has time to fix the problem. All it would take is fidelity to his own insistence, back when Republicans were stalling President Clinton's judges, that all nominees get hearings and votes within reasonable periods of time.

LOAD-DATE: August 09, 2002

National Law Journal

August 5, 2002
SECTION: OPINION; Vol. 24; No. 46; Pg. A24

LENGTH: 853 words

HEADLINE: A partisan blood sport By **Todd Gaziano** special to the national law journal
Ideology rules

BYLINE: Todd Gaziano is the director of the Center for Legal and Judicial Studies at The Heritage Foundation.

BODY:
special to the national law journal

The judicial confirmation process has reached a new low. There have been occasional confirmation battles over U.S. Supreme Court nominees in the past, but such battles have become less principled in recent decades. Over the last 20 or so years, the Senate also has slowed down the confirmation process toward the end of a presidential term if the president and Senate majority are from different parties.

What's new is that many of President Bush's initial nominees, particularly his appellate court nominees, have languished for more than 14 months without a hearing. Whether or not they all deserve to be confirmed, and whether the overall rate of confirmation is contributing to a judicial-vacancy crisis as some have argued, the Senate's conscious refusal to schedule hearings is a striking escalation in the confirmation wars. There is not even the prospect of a hearing by the end of this year for most of President Bush's first set of nominees, including many distinguished lawyers, professors and judges. And the few hearings that were scheduled for appellate court nominees this year have resembled an inquisition.

The tit-for-tat theory to explain this is not complete or very helpful. The real answer is that the judiciary has become much more powerful over the last half-century. This is not as it should be. But it is a fact with profound consequences for more than just the confirmation process.

The founding generation believed that the federal judiciary would be "the least dangerous" branch in large part because they thought the "judiciary power" was fundamentally different than that exercised by the political branches. In Federalist 78, Hamilton argued that legal traditions would cabin a judge's role and mode of decision-making. A judge, he maintained, would exercise "judgement" not "will." That conception of law-that judges can objectively discern what the law is, rather than what it should be-was the governing orthodoxy for more than 130 years.

Although there were some antecedents in post-Civil War nihilism, the legal realists of the 1920s

were the first to undermine significantly the earlier conception of law. Legal realism, mingled with strains of pragmatism, relativism and deconstructionist thought, captured the legal academy between the 1920s and 1960s, and then began to bear substantial fruit in the courts. Many in this era-and at least through the mid-1980s-came to see law as just politics by another name.

No matter how profoundly misguided this development was, it is not surprising that adherents increasingly urged the courts to become instruments of social change in overtly political ways. The courts' rulings ending government discrimination were (and are) necessary, but the tools the courts developed to fight the massive resistance to civil rights were also invoked to promote more amorphous social goals without clear constitutional foundations.

For a judge, such a seductive request is difficult to resist, especially when the dominant legal culture has eliminated the traditional moral constraints on judging. With differences of style rather than content, the courts began to assume the role of another political branch to which dissatisfied citizens could turn.

Ideology rules

In this climate, it is easy to see why rancorous judicial confirmation battles might develop. The process itself further politicizes the courts and reinforces the notion that the courts are little more than a political plum. Ideology matters greatly to a senator or a nominee who sees no meaningful difference between law and politics. To say that ideology should not matter much, and that extensive inquiry about it is destructive of an independent judiciary, espouses an understanding of law that few senators seem to share now.

The prevailing attitude is that the stakes are high, and to the victor go the spoils. Modern-day legal realists and activists of all stripes desperately want judges who will enact their will. Modern federalists sincerely want judges who will fight the temptation to act on political biases and instead adhere to a mode of judging that minimizes such influences, including careful adherence to the text and the intent of those who enacted the governing text. To the legal realists and activists, who believe no such code can be followed, the federalists' statements appear either ignorant or dishonest.

Thus, it is likely to take more than a procedural ceasefire among senators to end the war. One other condition might be required: either a significant change in our collective view of the proper role of the courts or an exogenous contraction in the judiciary's power (even less likely). As difficult as the first condition might be to foster, the federalist view is steadily gaining ground again. And men and women of good faith from the right and left have spoken out that ideology should not matter. But if nothing changes in the confirmation wars, the legal realists' understanding may become a self-fulfilling prophesy: Only those who behave as political ideologues will be appointed.

LOAD-DATE: October 15, 2002

FindLaw Forum: Why we must confirm judicial nominees and restore the courts to good health

By Marci A. Hamilton
FindLaw Columnist
Special to CNN.com

April 11, 2002 Posted: 1:48 p.m. EDT (1748 GMT)

(FindLaw) -- Remember when you were a kid, and you never wanted the game you were playing to end? You were having so much fun, and the only reason you had to stop was because some annoying adult said you had to do your homework, or simply announced, "That is enough." It was never enough if it was fun!

Now fast forward to a more adult context - that of the Senate Judiciary Committee, where another exciting game is being played non-stop. Since the late 1980's, the Committee -- whether controlled by the Republicans or Democrats -- has been playing a game of nomination keep-away. It's great fun for the players, but a disaster for the judiciary, and the rest of us.

Here is how the game is played, and why it must end.

The rules of nomination keep-away

First, every player must choose a political party to which he or she will be faithful, regardless of what's right. (It's just a game, so don't worry that this may be an unwholesome example for your children.)

Second, the President nominates qualified names for judicial appointments. (Unqualified candidates can be thrown out of the game at any time by any player.) In this game, hardly anyone wants to play the President, because after you make your nominations all you get to do is sit around and watch - which makes you look irrelevant, powerless, or both.

Third, the chairman of the Senate Judiciary Committee (everyone fights to be this guy) puts the names on playing cards and makes two stacks: "nominees I

don't mind," and "nominees who make me sick." "Nominees I don't mind" usually are in the party of the Chairman or have no paper trail. In contrast, "nominees who make me sick" are in the other party and have a paper trail of judicial decisions or law review articles.

The point of the game is to let the "nominees I don't mind" be confirmed, and ensure that consideration of the "nominees who make me sick" is delayed so long that the candidate is either no longer interested or dead. The other players can make their own playing cards, too, and do some swapping, but the Chairman's cards trump those of a mere committee member.

Now here comes the really fun part -- the committee members in the majority, with help from the Chairman, get to make up the game as they go along. For example, they can decide to let everyone veto a nominee they particularly do not like from their own state - or even veto any nominee they do not like. Plus, they have unlimited time to come up with rules that will make it harder for the nominees they don't like to make it through.

Patrick Leahy: Winner and still champion at the keep-away game

So far, the all-time winner in the nomination keep-away game is the current Senate Judiciary Committee chairman, Patrick Leahy. Here are his stats:

There are 89 vacancies in the federal courts. President Bush has nominated a total of 100 nominees, but the committee has only confirmed 52, most of them on the federal district courts, rather than on the more powerful and influential appeals courts.

By contrast, at the same point in the Clinton administration, the Republican-controlled committee had confirmed 66 percent of President Clinton's nominees. This shows that Sen. Leahy is doing very well in the game as compared to Sen. Hatch. (Indeed one might say Leahy's performance puts Hatch's to shame, except that the shame is really Leahy's.)

The judicial vacancy problem is worst in the courts of appeals, where only nine of President Bush's 30 nominees have been confirmed (less than a 30 percent confirmation rate). Indeed, since President Bush first announced his initial judicial nominations a year ago, only three of the 11 appellate nominees have been confirmed. No hearings are scheduled for any others.

Some circuit courts of appeal have an egregious shortfall. The Sixth Circuit, for example, is half empty, with only 8 out of 16 judges. Sadly, this situation persists despite the fact that the understaffed courts' workload rose 5 percent last year.

Again, by contrast, at the same time in the Clinton administration, eight out of 14 appeals court vacancies had been filled - a 57 percent confirmation rate for Hatch's Committee as compared to Leahy's 30 percent. The comparison once again shows Senator Leahy to be a champion nomination squelcher.

Why the game, though fun for players, needs to end now

The game has become so consuming that no player seems capable of making the game stop. There is no senatorial Mom to make them stop, so it's time for the Senators to stop the game themselves - even at the peak of their game. It's long

past time for the kids to quit playing and to do their homework.

Unless you are a judge, a lawyer, or a litigant, you are probably not particularly concerned about the federal courts' problems, but the federal courts affect everyone. When their benches are not full, cases take far longer to conclude-which means deserving plaintiffs are put off from receiving the awards they deserve, and criminal trials are far from the "speedy" trials the Constitution requires. Meanwhile, an overly heavy caseload pushes more cases that perhaps should have gone to trial into settlement negotiations, because the parties get tired of waiting. In too many circumstances, justice delayed is justice denied.

There is another unintended consequence to this contentious, slow-moving process, despite all the fun in Committee. Judicial candidates are less likely to want to be judges.

No one wants to be in limbo for months or years at a time, especially the litigator who must consider the future as he takes on new clients, wary to avoid potential conflicts of interest and concerned about the effect of his going on the bench in the middle of a case. Nor does anyone want to be raked over the coals in a political free-for-all, especially the person who is interested in a judicial appointment, which is -- after all -- a position that is supposed to be nonpolitical.

Perhaps most important, no one wants to take on the work of two or three or four judges simply because the Senate Judiciary Committee cannot bring itself to stop playing the keep-away nominations game. It is already the case that a law firm partner may well sacrifice hundreds of thousands, or even millions, to become a judge; it is not fair to also ask the same person for every single hour of free time.

If life were different, the game could go on forever, but life is tough and we all must grow up someday. For the sake of the people, the courts, and justice, it is time for the Senate Judiciary Committee to shut down the nominations keep-away game, as fun as it has been, and to turn to its first and highest obligation: serving the needs of this country.

Marci A. Hamilton, a FindLaw columnist, is the Paul R. Verkuil Chairwoman in Public Law at Benjamin N. Cardozo School of Law, Yeshiva University.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
BOYCE F. MARTIN, JR.
CHIEF CIRCUIT JUDGE

August 22, 2002

TELEPHONE
(502) 625-3800
FACSIMILE
(502) 625-3829

VIA FAX AND U.S. MAIL

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Mr. Chairman:

It was a great pleasure to meet with you and your staff when I was in Washington during July. As I told you at that time, I believe we both have the same objective, and that is to ensure that the public perceives our procedures as being fair and impartial. Needless to say, the event that gave rise to the current discussion creates in the minds of the public a belief that we are not proceeding in an impartial manner. I hope that the information that I provided to you at that time, as well as the information in this letter, will alleviate any fears that you might have that this could occur in the future.

In our joint effort within the Court to improve our delivery of services, we have undertaken an extensive review of the relationship between the federal statutes governing our operations, as well as the Federal Rules of Appellate Procedure and our own adopted rules. In addition, we are reviewing the need for internal operating procedures which relate only to internal court operation. That review will continue for the next six to eight months.

The steps that have already been taken to improve our procedures begin with our Court Meeting on October 31, 2001, in which we redrafted the procedures for the composition of the court sitting en banc. This procedure now follows the statute exactly, which excludes all senior judges unless they were on an original panel that heard a case.

Operating within a circuit as ours with eight vacancies out of sixteen positions, we, of course, have found great difficulty in completing enough panels to accomplish the task which is to operate as a court with eighteen Article III Judges available to hear appeals. In my earlier transmittals to you, I explained how our Circuit Executive constructs these panels. Needless to say, all the circuits with our enormous, diverse, geographic and population composition, operate in many different fashions. However, in our case, we are now operating with the Circuit Executive randomly

selecting the court and dividing it into two sections, then in turn assigning an active judge, a senior judge, and a district judge to a panel prior to advising the clerk's office of the composition of the panel. While the clerk's office is preparing the cases to be heard in oral argument, they in turn are matching sets of ten oral argument cases to the panels. Whenever disqualifications arise, either the case is remanded to the clerk or the judge on the panel is removed from the panel, and the Circuit Executive, the clerk, and the senior staff attorney draw the next available judge. Clearly, this is not a perfect situation, but it does provide, we believe, an indicia of impartiality and fairness.

In addition to those items outlined in my previously provided documentation, we have also begun a process where the panel, when a judge disqualifies him or herself, will be reconstituted by the senior staff members as outlined above or disbanded. When that occurs, the cases assigned to that panel will be returned to the clerk for redistribution among other panels. While this does not provide as much efficiency as we have had in the past, it does provide a clearly defined process to avoid any allegation of partiality.

As I said in our conference in July, our goals are similar. We wish the public to perceive the federal judiciary as impartial and fair. Hopefully, all that I have outlined will lead to a public perception that such is the case.

With my best wishes and appreciation, I remain,

Sincerely,

Boyce F. Martin, Jr.

BFM,jr:dp

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBERS OF
CAROLYN DINEEN KING
CHIEF JUDGE

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October 7, 2002

Via Facsimile (202) 225-3746
and Email
Ms. Kristen Schultz
Oversight Counsel
House Judiciary Committee
Subcommittee on the Constitution
362 Ford House Office Building
Washington, D.C. 20515

Re: Judicial Vacancies in the Fifth Circuit

Dear Ms. Schultz:

I am pleased to provide you with information about the impact of judicial vacancies on the district courts and the court of appeals in the Fifth Circuit.

First for the district courts. Our experience during the last year and a half is that the vacancies have been filled with reasonable speed once the administration sends forth a name to the Senate. The average time for confirmation, once the name is submitted, is approximately four months.

Our biggest problem in the district courts in this circuit has not been delay in filling vacancies. It has been our need for additional judgeships. The most acute need has been in the Western District of Texas. As of September 30, 2001, Western Texas ranked second in the nation with a weighted average caseload of 917 filings per judgeship (behind Southern California's 1,007). In computing that number (917), we gave effect to the new judgeship for Western Texas created by PL 106-553. Western Texas also ranked second in the nation with 373 criminal felony filings per judgeship (second behind Southern California's 478). The national averages for weighted filings and criminal felony filings were 479 and 77 per judgeship, respectively.

The Western District is huge from a geographical standpoint and travel between places of holding court (which frequently has

to be by car) takes many hours. As a result, the most severe problem has been in the El Paso division (which has two judges) and the Midland/Pecos division (which has one judge). Total case filings in the El Paso division (unweighted, because weighted filings are not available by division) during the year ended September 30, 2001 were 2,504, of which 2,086 were criminal cases. Total case filings in the Midland/Pecos division were 813 cases, of which 593 were criminal cases. Two judges simply cannot handle 2,504 cases per year, nor can one judge handle 813 cases, especially in the latter case when the travel demands between Midland and Pecos are taken into account. In addition, the promptness with which the civil docket in El Paso is addressed has suffered because as a result of the Speedy Trial Act, the judicial resources that are available must be devoted principally to criminal cases. Fortunately, assuming the President signs the Department of Justice Authorization bill just passed by both houses, the plan in Western Texas is to use the two judges that are provided for in that bill to ease the crisis in El Paso and Midland/Pecos. When and if that bill becomes law, if the vacancies thereby created can be filled with relative promptness, our crisis in Western Texas will be greatly alleviated.

At the circuit court level, we had three vacancies (out of seventeen authorized judgeships) a year and a half ago. One of those vacancies has existed, at this point, for five years. Another of those vacancies was filled with then Chief District Judge Edith Brown Clement of the Eastern District of Louisiana. So we are down to two vacancies. We have coped by using district judges from this circuit and visiting district and circuit judges from other circuits. Using visiting judges is something of a drawback because they may not be as familiar with our precedent as our own judges are. But, on the whole, we have done reasonably well using visiting judge help. We are current in our caseload, thanks to the visitors and to extraordinary effort on the part of our active and senior judges.

If I can provide any more information, please let me know.

Sincerely,

Carolyn Dineen King

Carolyn Dineen King

United States Court of Appeals
For the Third Circuit

Chambers of
Edward R. Becker
Chief Judge

13613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782
Phone: (215) 597-9542
Fax: (215) 597-7217

October 8, 2002

Honorable Steve Chabot
Chairman, Subcommittee on the Constitution
Congress of the United States
129 Cannon HOB
Washington, DC 20515-3501

Dear Congressman Chabot:

This is in response to the request of Kristen Schultz of your staff for an evaluation of the extent to which the judges and the work product of the Court of Appeals for the Third Circuit have been burdened and impaired by the long delay in filling judicial vacancies.

The Third Circuit still has two unfilled vacancies, and until September 23, 2002, we had three. As of that date the number of vacant judge months was 73. This meant that we were unable to fill our sitting roster with judges of the Court (active and senior). I have coped with the shortfall by recruiting senior Circuit Judges from within and outside the Third Circuit. I have been consistently able to recruit judges of the first rank, and so the panels have been filled with able judges, and the work of the court has gotten done on a current basis.

That said, I do not consider the situation I have described to be desirable. The critically important goal of achieving coherency and consistency in circuit law, so that it may be predictable, is best served by having a full complement of judges of the circuit who are fully conversant with circuit law. To that end, I hope that all of our vacancies will soon be filled.

Sincerely,

Edward R. Becker

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Chief Judge

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Philadelphia, Pa. 19106-1782
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October 14, 2002

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515-3951

Dear Congressman Sensenbrenner:

This will supplement my letter to you of October 8, 2002 commenting upon the difficulties we have faced due to vacancies in our circuit. In my letter, I was focusing on the ability of the Court to deal with counseled cases. In a rush to get the letter out I neglected to comment on our ability to handle pro se cases, which comprise 50% of our docket, and in which we cannot draw upon visiting judges. In this area, we are sorely pressed, for the burden on the judges of the Court is crushing and we are stretched to and beyond the limit.

Sincerely,

Edward R. Becker

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ROOM 416, 56 FORSYTH STREET
ATLANTA, GEORGIA 30303

J.L. EDMONDSON
CHIEF JUDGE

Via Mail and Fax
202-225-3746

8 October 2002

Ms. Kristen Schultz
Oversight Counsel
Constitution Subcommittee
362 Ford
Washington, D.C. 20512

Dear Ms. Schultz:

Pursuant to your request on behalf of the Judiciary Committee, I am writing about the problem of continuing judicial vacancies in the Eleventh Circuit.

At the outset, I should observe that district courts in Alabama and Florida have vacancies. Furthermore, some of our districts actually need more judgeships created in addition to having vacancies filled. The southeast is a part of the country that has a rapidly growing population, and case loads tend to follow population growth.

About the Court of Appeals, we have had a vacancy for almost two years. Our Court is authorized twelve judges. Although the Court leads the nation in number of cases per judge in most categories, twelve judges are enough. Of course, when one's court is authorized twelve active judges, it is understandable that, at times, there will be eleven: judges retire or die or resign. We can operate

with eleven judges not too badly for a few months. The chief problem is that, when we operate with eleven, we have lost all margin for error; it is like driving late at night with no spare tire. We have two judges in active service on the Court now who are already eligible to retire or to take senior status. If either or both of them were to decide to stop laboring hard, we would be in serious trouble immediately. We need a twelfth judge so that we can have eleven if someone else steps down or cannot continue to serve which is always a real likelihood. I have served on this Court when it had as few as nine active judges. We fell far behind at that time, and it took us years to catch up.

Our Court is organized internally in such a way as to operate at its best with twelve judges. When we operate with eleven, we are not at our best. As I have said, the Court statistically carries more cases per judge than most other courts of appeals and when we have a vacancy, each judge is having to take up that much more extra work. We feel privileged to be circuit judges. We each do the best we can. For now, I think the Court is still doing pretty well. But operating shorthanded for years at a time is a grinding experience on the Court and on its judges. No good can come from it; for example, the more grinding the work is the more likely it is that another judge will leave the Court or become ill. In my view, we simply have been very lucky that we have been able to carry on as we have.

We are not at our best now. And all that we need is for a judge to get sick or become disabled or just get worn out and quit, and the Eleventh Circuit Court of Appeals would be in dire straits immediately.

Very truly yours,

J. L. Edmondson

J. L. Edmondson
Chief of the Eleventh

United States Court of Appeals
District of Columbia Circuit
Washington, DC 20001

Douglas H. Ginsburg
Chief Judge

Telephone (202) 216-7180
Facsimile (202) 273-0875

October 16, 2002

The Honorable Steve Chabot
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am submitting this letter at the request of Ms. Kristen Schultz, Oversight Counsel to the Subcommittee on the Constitution. Because I was unable to testify at the October 10, 2002, oversight hearing, "A Judiciary Diminished is Justice Denied: the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary," Ms. Schultz asked whether I would be willing to submit a letter to the Subcommittee discussing the effect of judicial vacancies on the United States Court of Appeals for the District of Columbia Circuit. This is my response to that request.

Although authorized by statute to have 12 active judges, the D.C. Circuit now has only eight active judges, two judges having taken senior status in the last two years since. The court has not been down to eight active judges since 1980. While there are two nominations pending before the Senate, they have been pending for more than 17 months, and it is still unclear when and even whether they will be acted upon. It is clear, however, that if the court does not have additional judges soon, our ability to manage our workload in a timely fashion will be seriously compromised.

Indeed, in the 2001-02 term, the court had to cancel some days of oral argument. Cases that would have been heard on those days could not be heard until this September. For the current (2002-03) term, the court has been compelled to adopt an argument calendar for only eight full-time judges and our part-time senior judges, whose combined service is less than that of one full-time judge. Over the nine months of oral argument this term, the

court will hear cases on only 96 days and will be able to schedule only 336 cases. Were the court to have had the services of the two pending nominees for the full 2002-03 term, we could have added about 20 sitting days and scheduled about 75 more cases; with three additional judges we could have added 30 sitting days and scheduled more than 110 additional cases.

Because of the limited number of sitting days, the 2002-03 term argument calendar is already nearly full, indeed, there are no more slots for cases involving review of certain agency decisions, 18 of which have already been deferred until the 2003-04 term. With two more judges on the court, all those agency cases could be considered this term.

Finally, each active judge on the Court of Appeals (except the Chief Judge) is ordinarily assigned to a special panel for hearing emergency cases and all manner of motions for up to 16 weeks over the course of the calendar year. This duty is over and above the judges' argument calendar. With only seven judges now available for special panels, each of them is serving 6 weeks of "overtime" emergency duty. Indeed, we have often been forced to constitute emergency panels of fewer than three judges because of vacancies on the court. If even two more judges were available, all such "overtime" would be eliminated and each emergency panel would have its full complement of three judges. Thus, it is clear that the Senate's inaction is coming to jeopardize the administration of justice in this Circuit.

Sincerely yours,

Douglas Ginsburg

Douglas H. Ginsburg

Judge Shopping by . . . Judges?

Editorial
June 2002

by John C. Eastman

Client to lawyer: "What chance do I have at winning this case if we appeal?"
Lawyer to client: "I can't answer that until I know which judges get assigned to our panel."

Conversations similar to this are unfortunately becoming commonplace, the result of an ever-widening divide among jurists about the proper role of the courts and even the idea of the Rule of Law itself. Some jurists view the bench as one of three sources of governmental power, and the preferred source at that, because it is independent, unencumbered by the passions of the people that have such a controlling influence on the elected political branches. Under this view, the judiciary's most important role is to advance "fairness" and "justice" in areas where the elected branches have stubbornly resisted, and find their authority in notions of a living, breathing Constitution.

Other jurists challenge the very legitimacy of the enterprise undertaken by their black-robed brethren. For them, the principle legitimacy for law is majority rule, so striking down acts of the majority simply because they are counter to a judge's own predilections of fairness is viewed as raw usurpation. For this class of jurists, the power to strike down laws enacted by the majority is one that should be used rarely, and only when necessary to ensure compliance with the higher law embodied in the Constitution itself, as originally understood and adopted by a supermajority of the people.

This juridicial divide threatens to undermine the very legitimacy of the courts. To date, a legitimacy of sorts has been sustained because panels of judges are randomly drawn, thus minimizing opportunities to game the court system for preferred outcomes. But earlier this month, Sixth Circuit Judge Danny Boggs gave us a rare look at the internal workings of his Court, and we learn from his "Procedural Appendix" that the random assignment rules were themselves flouted in one of the most important cases heard by that Court this past year, *Grutter v. Bollinger*, addressing the constitutionality of the race-based admissions preferences employed by the University of Michigan Law School.

According to Judge Boggs, Chief Judge Boyce Martin appointed himself to fill a vacancy on the appellate panel whose authority to hear the merits was itself dubious, and once appointed, did not circulate to the full court a petition for initial consideration by the full en banc court until after the composition of the full court had changed dramatically by the taking of senior status by two of the Court's judges. The petition was finally circulated just 8 days prior to the date set for oral argument before the panel, and then

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scheduled for oral argument before the reduced en banc court on an expedited basis. Simultaneously, the Judiciary Committee of the United States Senate was engaged in an unprecedented refusal to hold hearings on any of President Bush's nominees to the entire Sixth Circuit Court of Appeals.

So was all this coincidence, or a deliberate attempt to engineer a particular outcome in the case? We may never know for certain, but the appearance of impropriety is sufficiently strong to warrant further inquiry.

I suggested that the assertion of jurisdiction over the merits appeal was dubious. Three years ago, a motions panel consisting of Circuit Judges Daughtrey and Moore and Senior District Judge Stafford decided an appeal of a procedural intervention motion while the case was pending in the district court. Under Sixth Circuit rules (as under the rules of most Circuit courts), a motions panel can retain jurisdiction of the merits appeal if the issues presented in the initial appeal are sufficiently related to the merits of the case to warrant further consideration by the initial panel. The earlier appeal on the denial of intervention was not so intertwined with the merits of the case as to warrant the panel keeping the case when it came back to the court on the merits. It is particularly important that this "must panel" power, as it is called, be narrowly construed lest it afford attorneys an opportunity for selecting their own appellate panel. In the Ninth Circuit, for example, motions panels sit for an entire month, so after the first ruling of the month is issued, every lawyer in the circuit knows who is on the motions panel. Indeed, the Ninth Circuit advertises that fact on its web site. Timing of interlocutory appeals when a "favorable" motions panel shows up would allow for appellate judge shopping.

Second, even assuming the motions panel had proper jurisdiction over the merits, Sixth Circuit rules required that the vacancy on the panel be filled by a random assignment, not by the Chief Judge appointing himself to sit on the panel to decide this exceptionally important and controversial case. Criticizing Judge Bogg's "Procedural Appendix," Circuit Judge Karen Nelson Moore pointed out that the Chief Judge had appointed himself in several other cases as well. Although none were as high-profile as this case, prior violations of the random assignment rule surely cannot make the self-appointment legitimate.

Third, by delaying the circulation of the petition for initial en banc consideration for five months, Chief Judge Martin's actions resulted in a different en banc court, perhaps dispositively so. The petition was filed on May 14, 2001. Judge Norris took senior status on July 1, 2001. Judge Suhrheinrich took senior status on August 15, 2001. The petition was circulated to the panel on August 23, but not circulated to the entire court until October 15, just eight days before argument was scheduled before the panel. The en banc court voted to grant the petition, cancel the panel hearing and schedule an expedited en banc hearing in December. Had the petition been voted upon when it was first presented, Judges Norris and Suhrheinrich would have had the option of serving on the en banc court.

Of course, this "window" of opportunity was likely to close soon, too. Judges Norris and Suhrheinrich were appointed by President Reagan and the first President Bush, respectively, with judicial philosophies more on the strict construction side of the judicial divide. Their replacements have been nominated by a President

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on Fighting for Freedom's Home (2002)
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on Conservatism (1999)
Clarence Thomas
on the Supreme Court (1998)
Margaret Thatcher
on Ronald Reagan and Freedom (1993)
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who pledged during his presidential campaign to appoint judges who would strictly interpret the law — people like Jeffrey Sutton from Ohio, who was nominated on May 9, 2001 but has yet to receive a hearing before the Senate Judiciary Committee.

Again, this may all be just coincidence, but the appearance of impropriety counsels strongly in favor of the Supreme Court granting certiorari in this case to consider the merits free of any hint of judge shopping by the judges themselves.

Dr. Eastman is a professor of constitutional law at Chapman University School of Law, the Director of the Claremont Institute Center for Constitutional Jurisprudence, and an adjunct fellow at the Ashbrook Center for Public Affairs at Ashland University.

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Clark still focused on House race

By Jerrie Whiteley

Herald Democrat

Although the U.S. Senate approved his nomination as a federal judge this week, Republican Ron Clark said he's still concentrating on the race to keep his seat in the Texas House of Representatives.

Clark's opponent, Democrat Donnie Jarvis, said Clark should stop campaigning and focus his efforts on getting ready for the federal bench. Jarvis and his campaign staff say Clark became a judge the instant that the Senate confirmed his nomination. They contend that Clark's continuation in the race for a seat he does not intend to keep will cost tax payers additional money in the form of a special election.

To back up their point, the Jarvis campaign points to the section of the state election code that says, "if an officer accepts another office and the two offices may not lawfully be held simultaneously, a vacancy in the first office occurs on the date the person qualifies for the other office."

Jarvis and his staff contend that Clark "qualified" for the office of federal judge when the Senate confirmed his nomination.

Clark said he's not a federal judge until President George W. Bush signs his nomination certificate. Further, Clark said that he has to wrap up his law practice before he can assume the bench.

"I will, at some point, be a federal judge," Clark said. However, Clark added that he doesn't think it will happen until after the Nov. 5 election. He mentioned that he might even return to Austin to work as a representative before the confirmation process is finished.

When asked about the theory that his decision to remain in the race has more to do with party politics than local representation, Clark bristled. He said he thinks the voters deserve to be able to make a choice in the upcoming elections. He said his name was held up in the Senate Judicial Committee until it was too late for him to withdraw from the race. That hold up, Clark said, was also politically motivated.

"The fact is that I am the state representative (for District 62) and I am on the ballot," Clark said.

Ann McGeehan, director of elections with the Texas Secretary of State's Office, agreed with Clark. She said he is still the representative for District 62. She said he can continue to campaign to be re-elected to that office even though he's been confirmed for the judgeship by the Senate.

"He would not actually become a judge until he is sworn in," McGeehan said. She said it's too late for Clark's name to be removed from the ballot for the Nov. 5 election. If Clark wins that election and Bush signs his confirmation certificate, then Clark could decline his state office. At that time, McGeehan said, the governor of Texas would call for a special election to fill Clark's vacancy.

If Clark did not decline his state office and accepted his federal office, his swearing in as a federal judge would be considered his resignation as a state representative, McGeehan said. She said there are only two ways a special election for the District 62 election could be avoided. Jarvis, McGeehan said, could win the Nov. 5 election, or Clark could decline the federal judgeship.

PREPARED STATEMENT OF NAN ARON, PRESIDENT, AND MARCIA KUNTZ, LEGISLATIVE DIRECTOR, ALLIANCE FOR JUSTICE

The old adage that justice delayed is justice denied is as true now as ever. What is not true, however, is that the Senate is moving at less than full speed in confirming the president's nominees to the federal bench. In fact, the Senate has confirmed 80 nominees during a period when it has had to focus on the war on terrorism, faced a shutdown under the threat of anthrax, and continues to grapple with some of the most important international issues of our time.

Those nominees whose records do not evince a clear hostility to the needs of ordinary Americans and to Congress' role in legislating critical rights and protections have received hearings and votes quickly. Since the Democrats took control of the Senate in the summer of 2001, the Judiciary Committee has held hearings on more than one hundred nominees. The Senate has confirmed 14 nominees to lifetime seats on the federal courts of appeals and 66 to the federal district courts.

By contrast, during the previous 6½ years of Republican control, the Senate confirmed an average of only 39 judicial nominees per year, including seven circuit court nominees. In the past 15 months, the Judiciary Committee has voted on more judicial nominees—100—including more circuit court nominees—17—than in any comparable period of Republican control.

Contrary to claims by some, the number of judicial vacancies has decreased significantly during the Democrats' control of the Senate. When Senator Patrick Leahy became chair of the Judiciary Committee, there were 110 vacancies in the federal judiciary. Notwithstanding the 41 additional vacancies arising since the July 2001 reorganization, the Senate has reduced the overall number of vacancies to 77.[1] The President has yet to nominate anyone for 29 of those vacancies.

The alarms sounded by some over the current "vacancy crisis" ring hollow. In July of 2000, then-Chairman Orrin Hatch said, "The claim that there is a vacancy crisis in the federal courts is simply wrong." Senator Hatch said that with 60 vacancies, "the federal judiciary currently is at virtual full employment." If that was true then, it surely cannot be the case that 17 more vacancies in an 852-seat federal judiciary would convert its status to one of "crisis," especially since Congress added several new seats to the federal judiciary after Senator Hatch made his statements.

Similarly, in 2000, Senators Helms and Thurmond opposed the confirmation of Roger Gregory to the U.S. Court of Appeals for the 4th Circuit. Even though five of the court's 15 seats were vacant, Senators Helms and Thurmond pointed to statements made by Chief Judge J. Harvie Wilkinson that the court had a sufficient number of judges. Yet, upon the inauguration of President Bush, both senators successfully pushed for 4th Circuit nominations for their own former staffers (for whom they had already secured district court appointments under President George H.W. Bush)—S.C. District Court Judge Dennis W. Shedd and N.C. District Court Judge Terrence W. Boyle.

Senators Thurmond and Helms in the 4th Circuit were by no means unique in their obstruction of highly capable, centrist candidates nominated by President Clinton. During the last six years of the Clinton administration, many of the president's moderate, consensus nominees met with resistance on the part of those who sought to reserve these judicial seats for a Republican president.

Now this Administration has pledged to make ideology the centerpiece of its judicial selection process, particularly with regard to circuit court nominees. Far too many of its nominees have records suggesting a hostility to progress made in the areas of civil rights, reproductive freedom, consumer and worker protections, and the environment.

For example, Judge Shedd routinely dismisses on summary judgment claims of race and gender discrimination, often in the face of contrary magistrate recommendations. Texas Supreme Court Justice Priscilla Owen, whose nomination to the 5th Circuit was recently rejected by the Senate Judiciary Committee, consistently rules in favor of big business, including campaign contributors, and against consumers and workers. Professor Michael McConnell, nominated to the 10th Circuit, argued in a law review article that the Supreme Court was wrong to uphold a denial of tax-exempt status to Bob Jones University, which discriminated on the basis of race. Judge Boyle was reversed by a unanimous Supreme Court for striking down a congressional redistricting plan designed to ensure full voting rights for African-Americans.

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[1] Six of the judges confirmed to the circuit courts were elevated from district court seats. Their confirmation did not reduce the overall number of vacancies because six district court vacancies were created at the same time that six circuit court vacancies were filled.

While delays resulting from an overburdened judiciary are cause for real concern, of even greater concern are nominees with little respect for the historic and noble role of the federal judiciary as guarantor of equal access to justice for all. Many of the Administration's nominees appear to be in the mold of some of the most conservative members of the federal judiciary, who assiduously search for legal justifications to close the courtroom doors to those seeking redress for civil rights violations, unfair employment practices, unsafe consumer products, and the contamination of our air and water. Several senators who were apparently unconcerned about the number of vacancies during the Clinton years now essentially call on the Senate to rubberstamp President Bush's nominees to address a purported crisis perpetuated by their own obstructionism.

Last year, hundreds of law professors signed onto a letter that stressed the Senate's constitutional role in independently evaluating nominees and recommended standards the Senate should use in those evaluations. Asserting that "no nominee is presumptively entitled to confirmation," the law professors took the position that the burden of proof rightfully lies with the nominee. They urged senators to confirm only those nominees who:

- have an exemplary record in the law;
- bring an open mind to decision-making, with an understanding of the real-world consequences of their decisions;
- demonstrate a commitment to protecting the rights of ordinary Americans and do not place the interests of the powerful over those of individual citizens;
- have fulfilled their professional obligation to work on behalf of the disadvantaged;
- have a record of commitment to the progress made on civil rights, women's rights and individual liberties; and
- manifest a respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached.

These are sound standards for the Senate to follow. In Congress's efforts to address the "vacancy crisis" in the federal judiciary, it must not lose sight of the need to fill those vacancies with judges who recognize that they serve all Americans, including the most vulnerable who have little voice in the political process. The Alliance for Justice has long promoted the importance of an adequately staffed judiciary. There is no question that an excessive number of vacancies and an overburdened judiciary impede the fair dispensation of justice. However, filling vacancies by appointing judges who lack a commitment to fairness and equality for all is no solution. Indeed, it would exacerbate the denial of justice.

18 October 2002

The Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chabot:

Thank you once again for the opportunity to testify at the hearing you conducted October 10, 2002 on the causes and effects of the federal judicial vacancy crisis. The Senate Judiciary Committee's continued refusal to schedule the promised meeting to vote on the nomination of Judge Dennis Shedd further confirms the breakdown in the confirmation process. The record of your hearing should go a long way in cataloguing the consequences of this failure in the Senate's constitutional obligations.

This letter is to follow up on my response to one question posed by Rep. Robert Scott of Virginia. I hope this letter will be placed in the hearing record and, if possible, a reference be made to it in the appropriate place in the hearing transcript.

As you may recall, my testimony focused a great deal on the special problems created by extended vacancies in the federal appellate courts. Rep. Scott asked me how many confirmation hearings were conducted for President Clinton's African-American judicial nominees in the Fourth Circuit Court of Appeals. I could only remember one such person who was nominated late in the 106th Congress; he has since been confirmed and is serving on that court.

Rep. Scott told me during the hearing that President Clinton nominated three African-Americans to judgeships within the U.S. Fourth Circuit, although even he erred in describing the courts to which they had been nominated. In fact, James Beatty and James Wynn were nominated at different times to the same seat on the Fourth Circuit Court of Appeals from North Carolina. Roger Gregory of Virginia was nominated to that court just before the Senate took its August recess during the 2000 election. I have since been able to confirm that none of these three individuals received a confirmation hearing during the Clinton Administration, although Gregory was re-nominated by President George W. Bush and has been subsequently confirmed and appointed.

I stand by the response I gave to Rep. Scott at the hearing that what occurred in the past ought not prejudice current nominees, but I wish to elaborate on several matters, in part because the question was based on a rather peculiar premise. First, I do not make it a point to learn the race of any judicial nominee, and I did not recall the race of two of the individuals Rep. Scott mentioned at the hearing. I may have an idea of a nominee's race in some cases, but the notion that race is a crucial factor in judicial confirmation is disturbing. Reverend King's dream was of a day when no one would be judged by the color of his skin. It is disappointing that anyone is working against that noble dream by politicizing the race of nominees when there is no basis for doing so.

Nevertheless, some partisan Democrats make it a point to play the ugly race card whenever they think they can gain a political advantage. For example, the race card was invoked to mask legitimate concerns senators had in 1999 that Ronnie White was insensitive on criminal justice issues. In contrast to the veto exercised by ten members of current Senate Judiciary Committee, Ronnie White's nomination was brought to a vote in the full Senate. Many Republican senators said they did not know that Ronnie White was an African-American when his nomination was defeated. I did not know his race either, until that fact was wrongly used to stir up resentment in minority communities.

Because Ronnie White was the only Clinton nominee defeated by the full Senate, it was extraordinary to accuse any senator of voting based on race–let alone that this followed a pattern. Yet, the argument was made by President Clinton and other partisan Democrats. Race-baiting maneuvers of this type are not justified by any legitimate end. Rep. Scott's purpose in asking the question of me was unclear, but it still lacked a coherent point unless it was meant to imply a racist reaction by Republican senators on the Judiciary Committee to several of President Clinton's judicial nominees in the Fourth Circuit.

Not only is there no basis for that caustic inference, but it also is irrelevant to the judicial nominees pending before the Senate right now. I noted at the hearing that President George W. Bush worked with Republican senators in Virginia to gain support for his re-nomination of Roger Gregory to the Fourth Circuit Court of Appeals from Virginia. President Bush then nominated Gregory for a lifetime position on that court and has since made the appointment permanent. This was a remarkable gesture, especially because Gregory had accepted a controversial recess appointment by President Clinton, which has rendered other nominees unconfirmable for that reason alone.

Why should President George W. Bush's other outstanding nominees to the Fourth Circuit be held up, especially when he chose a Clinton nominee to be the first life-time appointment of an African-American to that court? The only possible explanation for the behavior shown by the Senate Judiciary Committee is childishness or worse.

I also tried to explain during the hearing that there was a big difference in the way the Senate has historically treated nominees with support from home state senators and those without support from home state senators. Although Members of the House and the general public may not think the courtesy shown to home state senators is justified, it has a long pedigree that tends to be applied evenly to all senators–until the current Senate anyway.

When President George W. Bush could not secure the support of either of California's senators for the nomination of Rep. Chris Cox to the Ninth Circuit, he did not even make the nomination. Likewise, when President Bush could not secure the support of Maryland senators for the very well qualified nomination of Peter Keisler to the Fourth Circuit, he did not pursue the matter any further. President Clinton, however, nominated

James Beatty in 1995 knowing full well that he was strongly opposed at the time by both of his home state senators. He re-nominated Beatty again in 1997 with the same knowledge. At the time President Clinton nominated Roger Gregory and James Wynn in the 106th Congress, they also had opposition from at least one home state senator.

It would have been contrary to Senate practice to confirm those nominees. Moreover, when vacancy rates were somewhat high during the last Congress, it would have been a waste of committee time to conduct hearings on nominees opposed by home state senators when many other nominees stood a much better chance of being confirmed. President Clinton surely knew this at the time he made the nominations, but chose to play politics by creating a potential grievance or wedge issue. That President Clinton was willing to engage in race-baiting politics (with these judicial nominations and in many other instances) is disgraceful, but it is particularly sad that others are trying to play the same old racist song.

Those who are more familiar with the history of the North Carolina judicial positions have also reminded me that Terrence Boyle was first nominated by President George H.W. Bush for the seat that Beatty and Wynn were later nominated to fill. In contrast to Beatty and Wynn, Boyle had strong support from both of his home state senators at the time of his nomination. But the Democrat-controlled Senate held up his nomination until it died at the end of the 102nd Congress.

Regardless of the history of these judicial positions, however, there is no reason to hold up President Bush's renewed nomination of Terrence Boyle to the Fourth Circuit. Boyle received a unanimous qualified rating by the ABA review committee, which was said to be the "gold standard" by Chairman Patrick Leahy earlier this year. Boyle has been waiting for a hearing for 527 days in this Congress, and for about 11 years from the date of his first nomination.

Even more inexcusable, however, is the Senate's failure to act on well qualified nominees from Ohio who have been nominated to the Sixth Circuit Court of Appeals. As was made clear during last week's hearing, the Sixth Circuit has the highest vacancy rate of any federal appellate court. That rate was 50% for much of last year and is still about 44%. The emergency rules in place in that circuit have also led to accusations of judicial manipulation that may lead the Supreme Court to intervene.

Among the many outstanding nominees that President George W. Bush has made to the Sixth Circuit are two nationally respected lawyers from Ohio, Judge Deborah Cook and former Ohio Solicitor Jeff Sutton. Both have strong support from their home state senators. But both have also waited 527 days in this Congress for a Judiciary Committee hearing. As I mentioned in my earlier testimony before the Subcommittee, the delay in committee action on these individuals may have facilitated judicial manipulation of important cases. Moreover, I am confident that both Cook and Sutton would be confirmed by the full Senate.

Refusing to take action on judicial nominees for the simple reason that they *would* be confirmed by the full Senate is a special problem that the Senate and the President simply should not tolerate.

I hope this additional information is helpful to the Committee.

Sincerely,

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Todd Gaziano

PREPARED STATEMENT OF JUDGE DENNIS JACOBS

Mr. Chairman and members of the Subcommittee, I am Dennis Jacobs, Circuit Judge for the Second Circuit Court of Appeals and Chair of the Judicial Conference Committee on Judicial Resources. That Committee is responsible for all issues of human resource administration, including the need for Article III judges and support staff, in the U.S. courts of appeals and district courts. I am here today to provide information about the judgeship needs of the courts and the process by which the Judicial Conference of the United States (Conference) determines those needs.

Every other year, the Conference conducts a survey of judgeship needs of all U.S. courts of appeals and U.S. district courts. The last survey was completed in July 2000, and immediately thereafter the Conference recommended that Congress establish 63 new judgeships in the courts of appeals and district courts. On December 21, 2000, through the annual appropriation process, the Congress created nine [1] of the district judgeships included in those recommendations. In recognition of that action, on February 5, 2001, Mr. Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts, transmitted to the President of the Senate and the Chairman of the Senate Judiciary Committee a draft bill containing recommendations to create 54 additional judgeships,

10 (6 permanent and 4 temporary) for the U.S. courts of appeals, and 44 (23 permanent and 21 temporary) for the U.S. district courts. The Conference also recommended that 7 temporary district court judgeships created in 1990 be established as permanent positions and 1 temporary judgeship be extended for an additional 5 years. Appendix 1 contains the specific numbers recommended for each court. At the direction of the Conference, Mr Mecham again transmitted this same draft bill on May 28, 2002.

For many of the courts, the recommendations represent needs developed since 1990, the most recent year in which a comprehensive judgeship bill was enacted. Since that time, the Conference has submitted recommendations to Congress every other year on the numbers of additional Article III judgeships required in the judicial system.

SURVEY PROCESS

In developing recommendations for consideration by Congress, the Conference, through its committee structure, uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics manage these reviews, with final recommendations on judgeship needs approved by the Conference. This process involves the following six levels of review within the judiciary before a recommendation is transmitted to Congress: 1) the judges of the court making a request; 2) the Subcommittee on Judicial Statistics; 3) the judicial council of the circuit in which the court is located; 4) a second and final review by the Subcommittee; 5) the Committee on Judicial Resources; and 6) the Conference. During the last survey, the courts requested 78 additional judgeships (both permanent and temporary), but through this review process that number was eventually reduced to the 63 initially recommended by the Conference in July 2000.

During each judgeship survey, the Conference reconsiders all recommendations made from the prior survey, taking into account recent changes in workload, availability of resources, and adjustments to guidelines for evaluating requests. In some instances this review results in adjustments to previous recommendations for individual courts. As a result of this reconsideration process, the current Conference request for additional judgeships excludes eight judgeships recommended in 1999. For some of those, the courts withdrew their request, and for others the caseload no longer supported the need for additional resources.

JUDICIAL CONFERENCE STANDARDS

The recommendations developed through the review process noted above are based in large part on standards related to the caseload of the judges. These standards, provided at Appendix 2, are *not* optimum caseload levels, but instead represent the caseload at which the Conference may begin to consider requests for additional judgeships. So, the standards represent a starting point in the process rather than an ending point.

As important as the caseload statistics may be in evaluating a court's need for additional judgeships, the data must be considered with other court-specific infor-

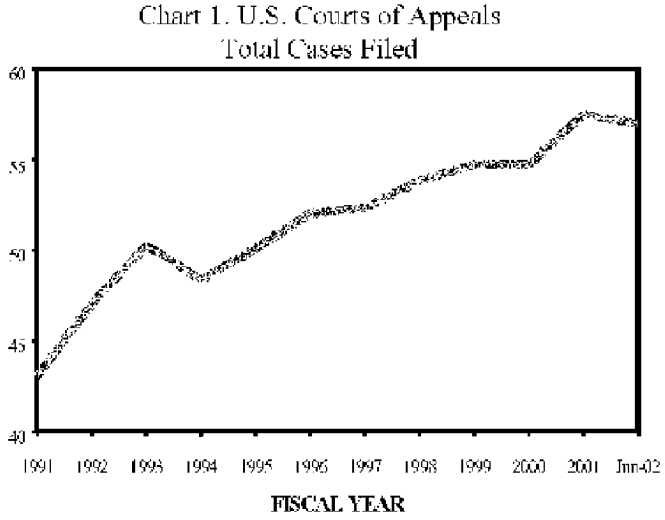
[1] The Congress created ten additional judgeships at that time, but one of the judgeships was not included in the Conference recommendations.

mation to provide an accurate indication of the judgeship needs of each court. The statistics alone do not reveal unique situations in a court that may result in an overstatement or understatement of the actual workload burdens. For that reason the Conference process takes into account additional factors that may impact the judgeship needs of each court, including senior judge and magistrate judge assistance, geographical factors, unusual caseload complexity, temporary caseload increases or decreases, and any other factors noted by individual courts as having an impact on resource needs.

In the district courts, for example, the standard used by the Conference as its starting point is 430 weighted filings per judgeship. During the last judgeship survey, however, the Conference made no recommendation for additional judgeships in any court where the weighted filings per judgeship were below 472. And, only four of the courts where the Conference recommended additional judgeships had weighted filings below 500 per judgeship. These caseload levels in courts where the Conference has recommended additional judgeships are substantially above the standard and reflect factors other than just caseload in a complete evaluation of the court's situation. So, although the process of evaluating judgeship needs is driven in large part by the workload as shown in caseload statistics, there is, of necessity, some degree of subjectivity involved in developing the judgeship recommendations.

BACKGROUND-CASELOAD INFORMATION

The last comprehensive judgeship bill for the U.S. courts of appeals and district courts was in 1990[2]. Public Law 101–650 established 11 additional judgeships for the courts of appeals and 74 additional judgeships for the district courts. Since that time, the caseloads in both the courts of appeals and the district courts continued to increase. By

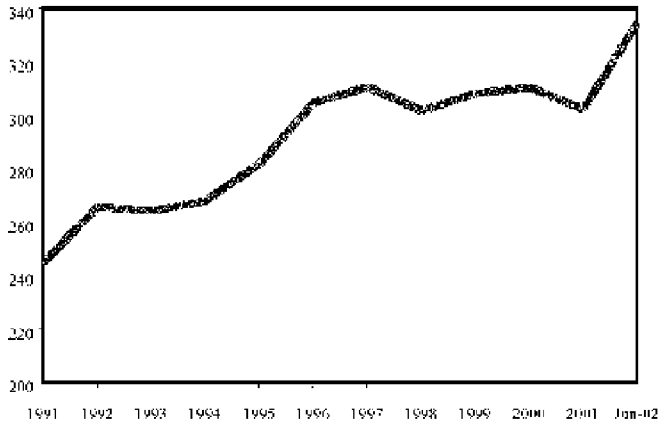


June 2002, filings in the courts of appeals (Chart 1) had grown by 32 percent while district court (Chart 2) case filings rose 37 percent (civil cases were up 27 percent while criminal felony filings almost doubled, up 96 percent). Although the Congress created 19 additional judgeships in the district courts in recent years in response to serious problems in certain districts, no additional judgeships have been created for the courts of appeals. As a result, the national average caseload per three-judge panel has reached 1,023, the highest level ever. In the district courts, even with the 19 additional judgeships, the number of weighted filings per judgeship, the primary measure of workload which takes into account some measure of complexity, were 504 as of June 2002—still well above the Judicial Conference standard for considering recommendations for additional judgeships. I have provided

[2]The Judiciary's appropriations bills for fiscal year 2000 and 2001, included nine and ten additional district court judgeships, respectively.

at Appendix 3 a more detailed description of the most significant changes in the caseload since 1991.

Chart 2. U.S. District Courts
Total Cases Filed

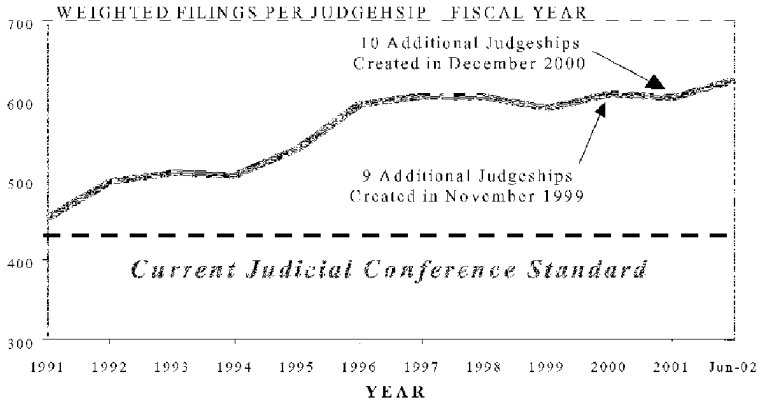


One important factor relating to the workload of the district courts, that is not obvious from the caseload data, is the change in the nature of the criminal business that has occurred since the early 1990's. Since 1991, the conviction rate for criminal defendants has grown from 82 percent of all defendants to 90 percent in 2002. Therefore, even without an increase in the caseload, there has been an increase in workload associated with the number of defendants requiring sentencing. This workload is further complicated by the Sentencing Guidelines, which require more of a judge's time than discretionary sentencing did in the past.

Another factor that increases the criminal workload relates to the number of defendants receiving terms of supervised release following a prison term. When Congress authorized the supervised release sentence in the Sentencing Reform Act of 1984, it created new work for district judges and magistrate judges that involves a class of defendants who previously were the responsibility of the United States Parole Commission. The responsibility for monitoring these defendants and reviewing potential violations of the terms of their supervision now rests with the district court. A large majority of defendants under supervision of the Federal Probation System are now serving terms of supervised release, so judges must now conduct hearings whenever these defendants violate the terms of their supervision. Only recently has the workload associated with the supervised release caseload been reflected in the weighted filings information used to support the need for additional judgeships. So, the recommendations included in the legislation understate this additional workload burden of the district courts.

Although the national figures provide a general indication of system-wide changes, the situation in courts where the Conference has recommended additional judgeships is much more dramatic. For example, there are now twelve district courts with caseloads in excess of 600 per judgeship and two where the caseload exceeds 800 per judgeship. For the entire group of district courts where the Conference is recommending additional judgeships, the weighted filings per judgeship have grown from 453 in 1991 to 625 in June 2002 (taking into account the 19 new judgeships created in 1999 and 2000), an increase of 38 percent (Chart 3).

Chart 3. Weighted Filings Per Judgeship in Courts with Recommendations for Additional Judgeships



The national data and the combined data for courts requesting additional judgeships provide general information about the changing volume of business in the courts. This information *does not*, however, provide the basis for the additional judgeships recommended by the Conference. Since judgeships are authorized by specific court rather than nationally, the workload data most relevant to the judgeship recommendations are those that relate to the specific courts where the Conference has made recommendations.

The attached Table 1 contains summary information about the numbers of additional judgeships recommended by the Conference for each court. The Legislative Affairs staff of the Administrative Office of the U.S. Courts has previously provided to each member of the Judiciary Committee the detailed justifications for the additional judgeships in each court. This material is too voluminous to attach as an appendix to this statement.

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not desire nor recommend indefinite growth in the number of judges. The concern about continuing growth is expressed in the *Long Range Plan for the Federal Courts* at Recommendation 15, which acknowledges that growth in the judiciary must be carefully controlled so that creation of new judgeships is limited to that number necessary to exercise federal court jurisdiction. However, as long as federal court jurisdiction expands rather than contracts, there needs to be a sufficient number of judges to properly serve litigants. The Conference is constantly attempting to balance the need to control growth and the need to seek resources that are appropriate to the workload. In an effort to place that policy in effect, we have requested far fewer judgeships than the caseload increases would suggest are now required.

On behalf of the Judicial Conference, I request that this Subcommittee give full consideration to the draft bill submitted by the Judicial Conference to establish 10 additional judgeships for the U.S. courts of appeals and 44 additional judgeships for the U.S. district courts.

APPENDIX 1

TABLE 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE 2001

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS	JUDICIAL CONFERENCE RECOMMENDATION
U.S. COURTS OF APPEALS		**6P, 4T**
FIRST	6	1T
SECOND	13	2P
SIXTH	16	2P
NINTH	28	2P, 3T
U.S. DISTRICT COURTS		**23P, 21T, 7T/P, Extend T**
ALABAMA, NORTHERN	7	1P, 1T
ALABAMA, MIDDLE	3	1P
ALABAMA, SOUTHERN	3	1T
ARIZONA	12	4T
CALIFORNIA, NORTHERN	14	1P
CALIFORNIA, CENTRAL	27	2T
CALIFORNIA, EASTERN	7	2P, T/P
CALIFORNIA, SOUTHERN	8	5P, 3T
COLORADO	7	1P, 1T
FLORIDA, MIDDLE	15	1P, 1T
FLORIDA, SOUTHERN	17	1P
HAWAII	4	T/P
ILLINOIS, CENTRAL	4	T/P
ILLINOIS, SOUTHERN	4	T/P
INDIANA, SOUTHERN	5	1T
NEBRASKA	4	T/P
NEW MEXICO	6	1P, 1T
NEW YORK, NORTHERN	5	1T, T/P
NEW YORK, EASTERN	15	3P
NEW YORK, WESTERN	4	1T
NORTH CAROLINA, WESTERN	3	2P
OHIO, NORTHERN	12	Extend T
OREGON	6	1T
TEXAS, EASTERN	7	1T
TEXAS, SOUTHERN	19	1P
TEXAS, WESTERN	11	2P, 1T
VIRGINIA, EASTERN	11	1P, T/P
WASHINGTON, WESTERN	7	1T

P = PERMANENT
T = TEMPORARY
T/P = TEMPORARY MADE PERMANENT
Extend T = EXTEND TEMPORARY 5 YEARS

APPENDIX 2

Judicial Conference Process for Courts of Appeals

At its September 1996 meeting, on the recommendation of the Judicial Resources Committee, which consulted with the chief circuit judges, the Judicial Conference unanimously approved a new judgeship survey process for the courts of appeals. Because of the unique nature of each of the courts of appeals, the Conference process involves consideration of local circumstances that may have an impact on judgeship needs. In developing recommendations for courts of appeals, the Conference takes the following general approach:

A. Courts are asked to submit requests for additional judgeships provided that at least a majority of the active members of the court have approved submission of the request; no recommendations for additional judgeships are made without a request from a majority of the members of the court.

B. Each court requesting additional judgeships is asked to provide a complete justification for the request, including the potential impact on its own court and the district courts within the circuit of not getting the additional judgeships. In any instance in which a court's request cannot be supported through the standards noted below, the court is requested to provide supporting justification as to why the standard should not apply to its request.

C. The Conference considers various factors in evaluating judgeship requests, including a statistical guide based on a standard of 500 filings (with removal of reinstated cases) per panel and with pro se appeals weighted as one third of a case. This caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Conference *does not* attempt to bring each court in line with this standard.

The process allows for discretion to consider any special circumstances applicable to specific courts and recognizes that court culture and court opinion are important ingredients in any process of evaluation. The opinion of a court as to the appropriate number of judgeships, especially the maximum number, plays a vital role in the evaluation process, and there is recognition of the need for flexibility to organize work in a manner which best suits the culture of the court and satisfies the needs of the region served.

Judicial Conference Process for District Court Reviews

In an ongoing effort to control growth, in 1993, the Conference adopted new, more conservative criteria to evaluate requests for additional district judgeships, including an increase in the benchmark caseload standard from 400 to 430 weighted cases per judgeship. Although numerous factors are considered in looking at requests for additional judgeships, the primary factor for evaluating the need for additional district judgeships is the level of weighted filings. Specifically, the Conference uses a case weighting system [3] designed to measure judicial workload, along with a variety of other factors, to assess judgeship needs. The Conference reviews all available data on the caseload of the courts and supporting material provided by the individual courts and judicial councils of the circuits, and takes the following approach in developing recommendations for additional district judgeships:

A. A level of weighted filings in excess of 430 per judgeship is used as a starting point for considering requests; this caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Conference *does not* attempt to bring each court in line with this standard.

B. The caseload of the individual courts is reviewed to determine if there are any factors present to create a temporary situation that would not provide justification for additional judgeships. Other factors are also considered that would make a court's situation unique and provide support either for or against a recommendation for additional judgeships.

C. The Conference reviews the requesting court's strategies for handling judicial workload, including a careful review of each court's use of senior judges, magistrate judges, and alternative dispute resolution, in addition to a review of each court's use of and willingness to use visiting judges. These factors are used in conjunction with the caseload information to decide if additional judgeships are appropriate, and to arrive at the number of additional judgeships to recommend for each court.

D. The Conference recommends temporary judgeships in all situations where the caseload level justifying additional judgeships occurred only in the most recent years, or when the addition of a judgeship would place a court's caseload close to the guideline of 430 weighted filings per judgeship. The Conference sometimes relaxes this approach in the case of a small court, where the addition of a judgeship would drop the caseload per judgeship substan-

[3] "Weighted filings" is a mathematical adjustment of filings, based on the nature of cases and the expected amount of judge time required for disposition. For example, in the weighted filings system for district courts, each student loan civil case is counted as only 0.031 cases while each cocaine distribution defendant is counted as 2.27 weighted cases. The weighting factors were developed on the basis of time studies conducted by the Federal Judicial Center on cases filed between 1987 and 1991.

tially below the 430 level. In some instances the Conference also considers the pending caseload per judgeship as a factor supporting an additional temporary judgeship.

Actions to Maximize Use of Judgeships

In addition to the conservative and systematic processes described in pages 1–3 for evaluating judgeship needs, given the current climate of fiscal constraint, the judiciary is continually looking for ways to work more efficiently without additional resources. As a part of the normal judgeship survey process or as a separate initiative, the judiciary has used a variety of approaches to maximize the use of resources and to ensure that resources are distributed in a manner consistent with workload. These efforts have allowed us to request fewer additional judgeships than the increases in caseload would suggest are required. Among the more significant methods in use are:

(1) *Surveys to review requests for additional permanent and temporary judgeships and extensions or conversions of temporary judgeships to permanent:* As described previously, surveys are conducted biennially of all Article III judgeships needs. To reduce the number of additional judgeships requested from Congress, the Judicial Conference has adopted more conservative criteria for determining when to recommend creation of additional judgeships in the courts of appeals and district courts.

(2) *Recommending temporary rather than permanent judgeships:* Temporary, rather than permanent, judgeships are recommended in those instances where the need for additional judgeships is demonstrated, but it is not clear that the need will exist permanently.

(3) *Development of a process to recommend not filling vacancies:* In March 1997, the Judicial Conference approved a process for reviewing situations where it may be appropriate to recommend elimination of a district judgeship or that a vacancy not be filled. The Judicial Conference includes this process in its biennial surveys of judgeship needs for recommending to the Executive and Legislative Branches that specific vacancies be eliminated or not be filled. A similar process has been developed and is in use for the courts of appeals.

(4) *Use of senior judges:* Judicial officer resource needs are also met through the use of Article III judges who retire from active service to senior status. Most senior Article III judges perform substantial judicial duties; over 375 senior judges are serving nationwide.

(5) *Shared judgeships:* Judgeship positions have been shared to meet the resource needs of more than one district without the cost of an additional judgeship.

(6) *Intercircuit and intracircuit assignment of judges:* To furnish short-term solutions to disparate judicial resource needs of districts within and between circuits, the judiciary uses intercircuit and intracircuit assignments of Article III judges. This program has the potential to provide short-term relief to understaffed courts.

(7) *Use of magistrate judges:* Magistrate judges serve as adjuncts to the district courts, supplementing the work of the Article III judges. Use of magistrate judges on many routine court matters and proceedings allows for more effective use of Article III judges on specialized court matters.

(8) *Use of alternative dispute resolution:* Since the late 1970s and with increasing frequency, courts use various alternative dispute resolution programs such as arbitration, mediation, and early neutral evaluation as a means of settling civil disputes without litigation.

(9) *Use of technology:* The judiciary continually explores ways to help align caseloads through technological advancements, where judges can assist other districts or circuits without the need to travel.

APPENDIX 3

Caseload Changes Since Last Judgeship Bill

With the creation of 19 additional district court judgeships, the total number of authorized district court judgeships has increased 2 percent since 1991; court of appeals judgeships have not increased. Since the last comprehensive judgeship bill was enacted for the U.S. courts of appeals and district courts, the numbers of cases filed in those courts have grown by 27 percent and 25 percent, respectively. Specific

categories of cases have seen dramatic changes over the last ten years, some increasing and some decreasing significantly. Following is a summary of the most significant changes.

U.S. COURTS OF APPEALS *(Change in authorized judgeships: 0)*

- The total number of appeals filed has grown by more than 11,000 cases since 1991.
- Appeals of decisions in civil cases from the district courts have increased nearly 28 percent.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 58 percent since 1991; this growth has occurred in matters involving both state and federal prisoners.
- Appeals of criminal cases have remained fairly stable over the last ten years, increasing only 4 percent.
- The number of appeals involving administrative agency decisions has fluctuated over the last several years, but is now 13 percent higher than in 1991.

U.S. DISTRICT COURTS (Change in authorized judgeships: +2%)

Civil Caseload

- Total civil filings rose almost 29 percent from 1991 to 1997 and have fluctuated since then. Even with the recent fluctuation, civil filings were 23 percent higher in 2000 than in 1991.
- The increase in civil filings resulted primarily from cases related to recovery of defaulted student loans (284.7%), civil rights (105.7%), social security (86.4%), copyright, patent and trademark (68.5%), and prisoner petitions (37.7%).
- Significant increases in mass tort filings of asbestos and breast implant cases contributed to the overall increase in total filings through 1997. Since then these filings have decreased to nearly 1991 levels.

  Some of the increases resulted, in part, from legislative actions:

  - civil rights filings increased steadily after the Civil Rights Act of 1990 was enacted. Filings rose from 19,892 in 1991 to 43,278 in 1997, and have since decreased slightly.
  - prisoner petitions overall were up 38 percent from 1991 to 2000. Habeas corpus petitions more than doubled, increasing from 12, 019 to 25,219. Prison civil rights cases (including prison condition cases) increased through most of the years, but fell substantially after prison litigation reform in 1996. Prison civil rights filings are now at approximately the same level as in 1991.
- Filings related to social security fluctuated considerably over the last eight years, but in 2000 were 86 percent higher than in 1991.
- Most of the significant decreases in filings from 1991 to 2000 occurred in case categories that have a relatively small number of cases. A few exceptions are property foreclosures which fell almost 3,400, forfeiture and penalty—down 3,200 filings, and bankruptcy appeals—down 1,550 filings.
- A slight decrease in filings from 1999 to 2000 occurred primarily because of reductions in personal injury product liability filings.

Criminal Caseload

- Since 1991, the number of criminal felony case filings increased 96 percent. After fluctuating between 1991 and 1994, criminal filings have steadily increased in the last eight years. Just since 1994, criminal felony case filings have more than doubled, up 111 percent.
- The largest increase by far has been in immigration filings which rose from 2,182 in 1991 to 12,150 in 2000.
- Drug-related filings increased almost 50 percent and defendants charged with drug offenses rose 32 percent.
- Although filings related to fraud fluctuated over the years, they have increased 12 percent from 6,948 to 7,788.
- Most of the significant decreases in filings occurred in offense categories that have a relatively small number of cases. The one exception is traffic offenses; the number of cases there has fallen 32 percent since 1991. These offenses,

however, are not a factor in the district court requests for additional judgeships.

The Judicial Vacancy Crisis: Quantity and Quality

By
Thomas L. Jipping, J.D.

Submitted to the U.S. House of Representatives Subcommittee on the Constitution
Following the Hearing
"A Judiciary Diminished is Justice Denied:
the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary"

Submitted on Behalf of:

60 Plus Association
American Center for Law & Justice
American Conservative Union
American Family Association
Centre for New Black Leadership
Christian Coalition of America
Citizens for Community Values
Citizens United Foundation
Concerned Women for America
Eagle Forum
Family Research Council
Gun Owners of America
Home School Legal Defense Association
Landmark Legal Foundation
Law Enforcement Alliance for America
Life Issues Institute
National Legal Foundation
Southeastern Legal Foundation
U.S. Business & Industry Council

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The Judicial Vacancy Crisis: Quantity and Quality

By
Thomas L. Jipping[1]

Submitted to the U.S. House of Representatives Subcommittee on the Constitution
Following the Hearing
"A Judiciary Diminished is Justice Denied:
the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary"

October 18, 2002

On October 10, 2002, the U.S. House of Representatives Judiciary Subcommittee on the Constitution held an oversight hearing on the current vacancy crisis in the federal judiciary. This report is submitted on behalf of various organizations[2] concerned about both the quantitative vacancy crisis and its qualitative cause.

Leftist political forces are obstructing President Bush's judicial appointments, thus perpetuating a judicial vacancy crisis, because they seek a judiciary more powerful, and more ideological, than those appointments will likely provide. They see an unelected federal judiciary, rather than an elected legislature, as a more reliable and potent vehicle for achieving their political goals.

I. Quantity: Is There a Vacancy Crisis?

A. What Is a "Vacancy"?

To the layman, a judicial "vacancy" implies an empty position with no one doing any work. Judges in "active" service can, however, assume "senior" status, a form of semi-retirement that allows them to continue working and receive a full judicial salary.[3] The change in status does create an active-service "vacancy" needing a replacement, but means a judge remains, maintaining a partial caseload. Fifty-eight of the current 77 vacancies (75 percent) were created by judges assuming senior status,[4] a proportion comparable to previous years.[5]

Judicial vacancies will always be with us. In his 2001 annual report on the judiciary, Chief Justice William Rehnquist acknowledged that "part of the problem is endemic to the size of the federal Judiciary. With more judges, there are more retirements and more vacancies to fill."[6] Nonetheless, vacancies have a greater impact when they are widespread, of long duration, and deliberate.

B. Judicial "Full Employment"

The federal judiciary currently contains 862 permanent positions[7] and judges, who serve for an unlimited term,[8] retire whenever they wish. Some announce their retirement months in advance,[9] others do not. One scholar testifying before the Subcommittee concluded that "a vacancy rate of about three to four percent [26-34 vacancies] represents the 'full employment' level … for the federal judiciary."[10] The current 77 vacancies constitute a 9 percent vacancy rate.

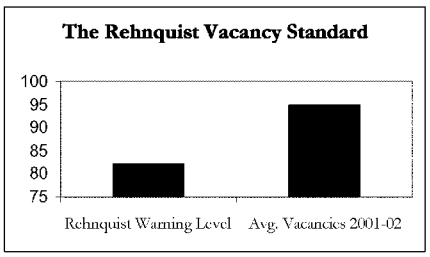
C. Is There a Vacancy "Crisis"?

1. The Rehnquist standard

One possible "crisis" benchmark comes from Chief Justice William Rehnquist. When there were 82 vacancies, he warned in his 1996 annual report on the judiciary that "filling judicial vacancies is crucial to the fair and effective administration of justice."[11] One year later, with vacancies at the same level, Chief Justice Rehnquist's warning was more direct: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal Judiciary."[12]

Democrats frequently quoted Chief Justice Rehnquist's warnings to argue for more confirmations.[13] In his 1998 State of the Union Address, for example, President Clinton said: "Here is what the Chief Justice of the United States wrote: 'Judicial vacancies cannot remain at such high levels indefinitely without eroding the quality of justice.' I simply ask the United States Senate to heed this plea and vote on the highly qualified nominees before you, up or down."[14]

Chief Justice Rehnquist's warning focused on a sustained high vacancy rate. Vacancies have only recently dropped to the current level, vacancies averaging 100 in 2001 and 95 overall since President Bush took office. This prompted Chief Justice Rehnquist, in his 2001 annual report, to repeat his 1997 warning and urge the Senate "to act with reasonable promptness and to vote on each nominee up or down."[15]

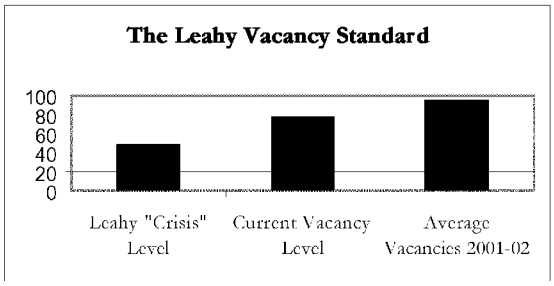


2. The Leahy standards

Current Senate Judiciary Committee Chairman Patrick Leahy (D-Vermont) has also offered standards for identifying a judicial vacancy crisis. Responding to Chief Justice Rehnquist's 1997 warning, for example, Sen. Leahy said: "I hope his message will help shame the Senate into clearing the backlog early in the new year."[16] Vacancies under President Bush have averaged 16 percent above the level when the Chief Justice issued his warning, a level Sen. Leahy condemned as "poor" and worthy of "shame."

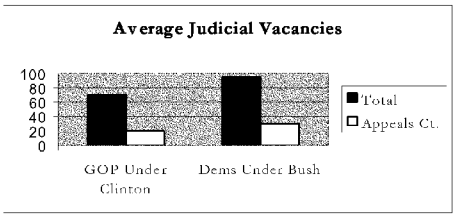
Sen. Leahy also condemned the Senate for leaving "more than 40 judicial nominees" in "limbo, having never been accorded a Senate vote."[17] Of the 47 currently pending nominees, 24 have not yet received a hearing in Sen. Leahy's committee. Nearly half of these have been waiting for more than a year.

On October 21, 1998, Sen. Leahy said that 48 vacancies (5.6 percent) constituted "a judicial vacancy crisis."[18] Vacancies are currently 60 percent higher than Sen. Leahy's "crisis" level and have averaged 98 percent higher since President Bush took office.

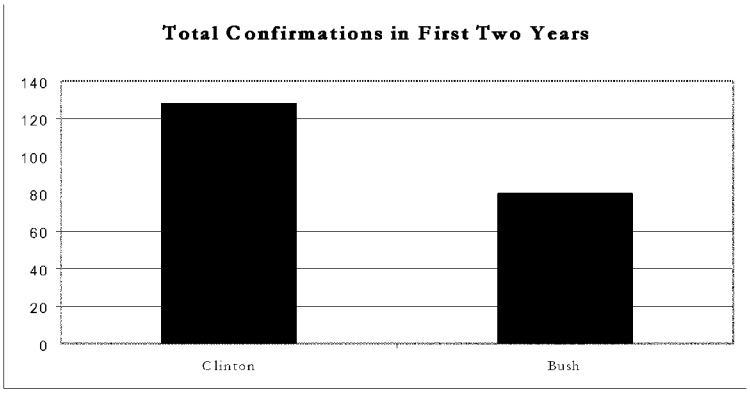


3. Historical standards

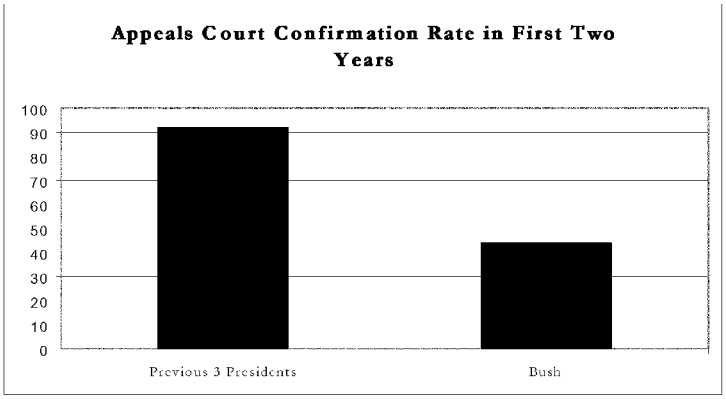
With Democrats running the Senate, judicial vacancies under President Bush have averaged 95, compared to an average of 70 when Republicans ran the Senate under President Clinton. Vacancies on the U.S. Court of Appeals have been 50 percent higher under President Bush than under President Clinton.



Confirmations provide another comparison. The Senate confirmed 128 nominees during the first two years of the Clinton administration but just 80 during the first two years of the Bush administration. Democrats controlled the Senate during both periods, suggesting a partisan pattern.

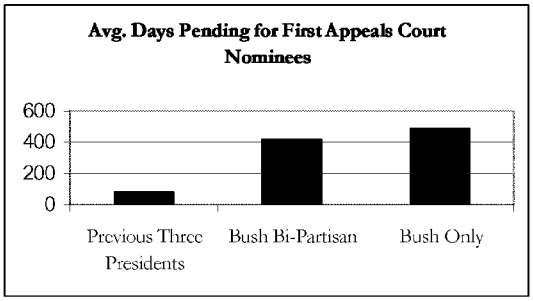


Confirmation rates are an even better measure than confirmation totals because they account for the number of nominations. The Senate confirmed an average of 92 percent of the three previous presidents' appeals court nominees during their first two years, compared to just 44 percent for President Bush.



Another historical standard reflects the deference traditionally given to a new president's first nominees. President Bush sent his first group of 11 appeals court nominees to the Senate on May 9, 2001. Three have been confirmed, three have had a Judiciary Committee hearing but no vote, one has been defeated in the Judiciary Committee, and four have yet to receive a hearing at all. The average time pending in the Senate for this first group of nominees is 421 days.

Two of the three confirmed nominees, however, had already been named to the federal bench by President Clinton, one to the U.S. District Court and the other, by recess appointment, to the Fourth Circuit. President Bush nominated U.S. District Judge Barrington Parker to the Second Circuit and Judge Roger Gregory to a full position on the Fourth Circuit as a "good will" bi-partisan gesture. Removing these from the calculation shows that the nine appeals court nominees originally selected by President Bush have been pending for an average of 489 days. By comparison, the three previous presidents saw their first 11 appeals court nominees confirmed in an average of 81 days.



4. Ralph Neas' fake standards

Ralph Neas, president of People for the American Way (PAW), testified before the Subcommittee. In his oral remarks and written statement, Mr. Neas repeated several claims PAW has often made about confirmation of President Clinton's judicial nominees by the Republican Senate during 1995-2000.

First, Mr. Neas claimed that "35 percent of President Clinton's appellate court nominees were blocked from 1995-2000."[19] **Creative statistical tricks allow Mr. Neas to overstate the truth by at least 40 percent.**

This and other similar claims state confirmations as a percentage of "nominations" rather than "nominees." An individual nominee, however, can result in more than one nomination if the Senate does not confirm him and the president re-nominates him. The focus on nominations rather than nominees overstates the nomination totals and understates the confirmation rate.

Mr. Neas counts as "blocked nominations" individuals who are today serving as federal judges!

According to the Congressional Research Service, President Clinton's appeals court nominations exceed his appeals court nominees by nearly 20 percent.[20] The CRS data show that during 1995-2000, President Clinton nominated 68 individuals to the U.S. Court of Appeals, withdrew four of them himself, and the Senate confirmed 41 of the rest. Eliminating several others who were nominated too late to be confirmed[21] shows that the Republican-led Senate failed to vote on about 25 percent of President Clinton's appeals court nominees. Not only is this significantly less than Mr. Neas' claim, but he provided no benchmark for evaluating whether even the figure he used was outside the historical norm.

Second, Mr. Neas claimed that "45 percent [of President Clinton's appellate court nominees] failed to receive a vote in the Congress during which they were nominated."[22]

Accepting this as an accurate statement for the moment, the situation is, by Mr. Neas' own measure, obviously worse today. At least 54 percent of President Bush's appellate court nominees have not received a vote during the 107th Congress. Not surprisingly, Mr. Neas did not mention this in his testimony.

This claim, however, is false because it too counts nominations rather than nominees. Mr. Neas can thus count many nominees as not receiving a vote in the Congress during which they were nominated, even though most of these nominees were eventually confirmed. The CRS report cited above, in fact, states that "most … of the persons whose nominations were returned" and the end of a two-year Congress "were later re-nominated and ultimately confirmed."[23]

President Clinton, for example, nominated William Fletcher to the U.S. Court of Appeals for the Ninth Circuit three times, in the 103rd-105th Congresses. The Senate confirmed him on October 8, 1998, one of the many sitting federal judges whom Mr. Neas would count as "blocked."

Another gimimick allowing Mr. Neas to create fake standards is comparing different time frames. As he did in his testimony before the Subcommittee, he will often compare "the first year during which Democrats controlled the Senate, beginning in July 2001"[24] with a previous calendar year.

II. Quality: The Cause of the Vacancy Crisis

The Constitution gives the president the power to nominate and, subject to Senate approval, to appoint federal judges.[25] As former Senate Majority Leader Robert Dole has said, these appointments may be a president's "most profound legacy."[26] Former Attorney General Edwin Meese agrees: "No President exercises more power more far-reaching, more likely to influence his legacy, than the selection of federal judges. Laws come and go; policies wax and wane; but judges, it often seems, go on forever."[27] Federal judges have unlimited terms, serving "during good behavior"[28] until they leave office voluntarily or by

impeachment.[29] More importantly, during that unlimited tenure federal judges have the final word on the meaning, and thus the content, of our laws.

By original design and through most of American history, the scope of this power was very modest. America's founders believed that the judiciary would be the "weakest"[30] branch of government because the legislative branch, which has "superior weight and influence,"[31] makes the law. The judiciary's task is merely "interpretation"[32] which is "the process of…ascertaining the meaning of a…written document."[33] While the legislative task involves political "will,"[34] the judicial task involves "judgment."[35] The law's meaning comes from those who make, not those who interpret, it.

This "judicial restraint," that is, judges restrained by law made by others, is part of the system of separated government powers that is necessary to preserve liberty itself. Alexander Hamilton stressed that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"[36] The Supreme Court has recognized that the separation of government powers was "adopted by the Framers to ensure the protection of 'our fundamental liberties.'"[37]

Like the U.S. Constitution, every state constitution separates government power into legislative, executive and judicial branches. This separation alone implies that each branch may not exercise the powers given to the others. At least 35 states,[38] however, explicitly state, in the words of the Arizona Constitution, that each branch "shall be separate and distinct, and no one [branch] shall exercise the powers properly belonging to either of the others."[39] Some states even identify this separation of powers, including the judicial branch's inability to exercise lawmaking power, as necessary "to the end that it may be a government of laws and not of men."[40]

The debate over judicial appointments is thus a debate over "the proper limits of judicial power."[41] That is, should the separation of powers be maintained and judges remain limited to interpreting the law or should the separation of powers be scrapped and judges have the power to make law?

A. The Obstruction Campaign's Goals

Leftist political forces oppose a judiciary that allows the people to make law because the people reject the leftist political agenda. The far-left needs a liberal activist judiciary to achieve its political goals. The far-left opposes President Bush's judicial nominees because he has pledged to appoint judges who will not legislate from the bench.[42]

1. Limiting judicial appointments

This obstruction campaign's first goal is to limit Bush appointments to all federal courts in general, and to certain courts in particular. This goal, in turn, has two related motives, preventing appointment of judges not likely to rule "favorably" and, therefore, to maximize the influence of liberal activist judges already on the bench.

The far-left wants to maintain, for example, the current 51 percent majority of full-time judges appointed by Democrat presidents.[43] It also wants to maintain the composition of individual courts. Of the 24 full-time judges on the U.S. Court of Appeals for the Ninth Circuit, for example, 17 (71 percent) were appointed by Democrat presidents, 14 of them (58 percent) by President Clinton alone. President Bush has made nominations to fill two of the four current vacancies but neither has received a Judiciary Committee hearing.

Similarly, seven of the 16 full-time positions on the U.S. Court of Appeals for the Sixth Circuit are vacant. Of the nine full-time judges, six (67 percent) were appointed by Democrat presidents, five (56 percent) by President Clinton. President Bush has made nominations to fill all seven of the current vacancies but only one has received a Judiciary Committee hearing. Of these seven nominations, two have been pending for 527 days, three for 344 days, and one for 303 days.[44]

2. Influencing judicial decisions

As Todd Gaziano described in his Subcommittee testimony, prolonged numerous vacancies can permit certain "emergency rules to operate."[45] These rules can alter the normal composition of the three-judge appeals court panels to include two senior or visiting judges rather than two full-time judges.[46] This, in turn, can influence the results and reasoning in judicial decisions from what they would have been otherwise. The Ninth Circuit decision declaring the Pledge of Allegiance unconstitutional because it contains the words "under God"[47] was one of those cases.

Mr. Gaziano also described how multiple, long-standing vacancies make "judicial manipulation of the docket" a "disturbing possibility."[48] He gave one prominent example, a case in which the Sixth Circuit upheld the University of Michigan's racial preference admissions policy.[49] The district court had struck down the policy.[50] On May 14, 2001, those defending the policy asked that the entire *en banc* Sixth Circuit, rather than a three-judge panel, consider the appeal. At the time of this request, the Court had 11 full-time judges, six Democrats and five Republicans. Chief Judge Boyce Martin, a Carter appointee, did not circulate the *en banc* request until October 15, after two Republican appointees had retired. The now-reduced Court took the case and voted 5-4 to uphold the racial preference policy on May 14, 2002. The chief judge wrote the opinion, with all five judges in the majority Democrat appointees and three of the four dissenters Republican appointees.

At that time, seven Bush nominees were pending in the Senate Judiciary Committee, two of them for more than a year and six for more than six months. This was certainly enough time for confirmation, since the Committee has confirmed at least seven appeals court nominees within six months of their nomination.[51] And it is likely that the votes of any who had been confirmed would have changed the outcome of this case, an outcome that was in direct contrast to the way other circuits had decided the same issue.[52]

B. The Obstruction Campaign's Tactics

1. Changing the Senate's role

The far-left will employ whatever tools will help achieve its political goals. If judges are more receptive than legislatures, leftists abandon the statehouse for the courthouse, even if doing so upsets the separation of powers. Similarly, when the people elect a president pledged to nominating restrained judges, the far-left tries to empower the Senate to play a more aggressive role, even if doing so upsets the constitutional division of roles in the judicial selection process.

The blueprint for this approach was created in 1985 with publication of Harvard law professor Laurence Tribe's book *God Save This Honorable Court*. The Senate used his battle plan to defeat the 1987 Supreme Court nomination of Robert Bork. That episode in confirmation politics is repeating itself, with Professor Tribe again advising Senate Democrats, testifying at a June 2001 hearing that ideology should drive confirmations.[53]

As Professor John Eastman outlined in his Subcommittee testimony, America's founders gave the exclusive power to nominate and the primary power to appoint federal judges to the president.[54] This is clear, first and foremost, from the Constitution's text itself. The sole mention of judicial selection is found in Article II about the executive branch. Alexander Hamilton wrote the obvious, that "in the business of appointments the executive will be the principal agent."[55]

This, then, makes Mr. Neas's claim that "the Senate has a co-equal role with the President in appointing federal judges"[56] absolutely incomprehensible. One can readily see the political or tactical value for him of fundamentally altering the Constitution's assignment of judicial selection responsibilities, but tactical value alone does not make it so.

As to the Senate's role of checking the president's ultimate appointment, Hamilton wrote that it would have "a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters."[57] In contrast, the far-left wants the Senate to have a very loud operation directed toward co-opting the president's appointment power altogether.

2. Judiciary Committee defeating nominees

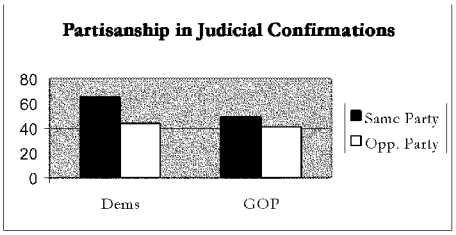
Other historical standards relate to the tactics used to defeat Bush nominees. Appeals court nominee Priscilla Owen, for example, was the first female nominee ever voted down in the Judiciary Committee and the first who had received a unanimous "well qualified" rating from the American Bar Association. She was the second Bush nominee voted down by the Judiciary Committee, only the sixth in nearly 60 years.[58]

Republicans never defeated a Clinton nominee in the Judiciary Committee when they ran the Senate during 1995-2000. Even Ronnie White, the only Clinton nominee defeated by the full Senate, was approved by the committee and sent to the Senate for a final vote.

3. Partisanship

The Judiciary Committee has voted on three nominees to the U.S. Court of Appeals for the Fifth Circuit, one each from Texas, Louisiana, and Mississippi, the three states in the jurisdiction. The committee, by the same party-line vote, defeated the two nominees from states with two Republican senators, Priscilla Owen from Texas and Charles Pickering from Mississippi, and approved the nominee from a state with two Democrat senators, Edith Clement from Louisiana.[59] Several other appeals court nominees who remain stuck in the Judiciary Committee – Deborah Cook and Jeffrey Sutton of Ohio, Michael McConnell of Utah, and Timothy Tymkovich of Colorado – are from states with two Republican senators. Others, including Dennis Shedd of South Carolina, have the bi-partisan support of their home-state senators.

When Democrats control the Senate, they confirm an average of 65 nominees per year for a Democrat president (1993-94) and 44 nominees per year for a Republican president (1987-92, 2001-02), for a partisan differential of 21. When Republicans control the Senate, they confirm an average of 49 nominees per year for a Republican president (1981-86) and 41 nominees per year for a Democrat president (1995-2000), for a partisan differential of eight.



III. Conclusion

By most objective measures, certainly by those Democrats have used in the past, there is a judicial vacancy crisis today. The cause of that crisis, however, is more important. The campaign to obstruct President Bush's judicial appointments is perpetuating the vacancy crisis to keep to a minimum appointment of restrained judges who will let the people make the law. Restrained judges, however, who know their proper place in our system of separated government power, are necessary for the people to retain the power to govern ourselves and, therefore, to preserve our liberty.

NOTES

[1] Senior Fellow in Legal Studies, Concerned Women for America. M.A. in political science, State University of New York (SUNY) at Buffalo (1989); J.D. *cum laude*, SUNY-Buffalo (1987); B.A. with honors, Calvin College (1983). Law Clerk to Judge William D. Hutchinson, U.S. Court of Appeals for the Third Circuit (1988-89).
[2] Organizations endorsing this report include the 60 Plus Association, American Center for Law & Justice, American Conservative Union, American Family Association, Centre for New Black Leadership, Christian Coalition of America, Citizens for Community Values, Citizens United Foundation, Concerned Women for America, Eagle Forum, Family Research Council, Gun Owners of America, Homes School Legal Defense Association, Landmark Legal Foundation, Law Enforcement Alliance of America, Life Issues Institute, National Legal Foundation, Southeastern Legal Foundation, U.S. Business & Industry Council.
[3] See 28 U.S.C. section 371 (1994).
[4] See http://www.uscourts.gov/vacancies/judgevacancy.htm.
[5] In April 2000, the figure was 67.5 percent; in September 1999, it was 77.9 percent; in March 1999, it was 83.3 percent; in October 1998, it was 87.1 percent; in April 1998, it was 84.6 percent; and in April 1997, it was 81 percent. See Jipping, "From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection," 4 *Texas Review of Law & Politics* 365,419 (2000).
[6] http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html.
[7] This includes 665 positions on the U.S. District Court, 179 on the U.S. Court of Appeals, nine on the U.S. Court of International Trade, and nine on the U.S. Supreme Court.
[8] U.S. Constitution, Article III, Section 1 ("The Judges … shall hold their Offices during good Behaviour"). This clause does not impose an additional condition for service, or an additional ground for removal, but only that judicial tenure, unlike legislative or executive, is not limited to a term of years. See Fenton, "The Scope of the Impeachment Power," 65 *Northwestern University Law Review* 719,724-25 (1970); Ferrick, "Impeaching Federal Judges: A Study of the Constitutional Provisions," 39 *Fordham Law Review* 1,51 (1970) ("'Good Behaviour' was an expression of 'tenure,' used to secure the independence of the judiciary.").
[9] The Administrative Office of the U.S. Courts currently lists 15 future vacancies, all on the U.S. District Court, six of them at least six months in the future. See http://www.uscourts.gov/vacancies/futurevacancy.htm.
[10] T. Gaziano, "Testimony of Todd F. Gaziano" House Judiciary Subcommittee on the Constitution (October 10, 2002), at 5 (hereinafter *Gaziano Testimony*). In 1994, the Clinton administration argued that 63 vacancies constituted "virtual full employment." See Hatch, "Judicial Nominees: The Senate's Steady Progress," *The Washington Post*, January 11, 1998, at C9; *Congressional Record*, January 28, 1998, at S74 (statement of Sen. Hatch); *Congressional Record*, May 21, 1998, at S5316 (statement of Sen. Hatch) ("[T]he Clinton administration is on record as having stated that 63 vacancies is virtual full employment for the federal judiciary."). Vacancies under President Bush have averaged 51 percent above even this higher benchmark.
[11] http://www.uscourts.gov/cj96.htm.
[12] http://www.uscourts.gov/ttb/jan98ttb/january.htm.
[13] Current Judiciary Committee Chairman Sen. Patrick Leahy (D-Vermont) frequently cited Chief Justice Rehnquist's statements during Judiciary Committee meetings and in speeches before the full Senate. See, e.g., *Congressional Record*, April 14, 1999, at S3670; *Congressional Record*, October 22, 1997, at S10924; Judiciary Committee Statement, September 30, 1997; *Congressional Record*, September 11, 1997, at S9163; *Congressional Record*, July 10, 1997, at S7206; *Congressional Record*, June 26, 1997, at S6492. Sen. Edward Kennedy (D-Massachusetts), a longtime Judiciary Committee member, has done the same. See *Congressional Record*, March 19, 1997, at S2515). Former Attorney General Janet Reno referred to the Chief Justice's warnings in her August 5, 1997, speech to the American Bar Association. Sen. Charles Schumer (D-New York), a Judiciary Committee member, wrote a letter to the editor of the Albany *Times Union* on January 18, 1998, in which he stated that the Chief Justice "is correct in saying that partisan concerns are leading to a plethora of judicial vacancies."
[14] http://www.janda.org/politxts/State%20of%20Union%20Addresses/1993-2000%20Clinton/Clinton.98.html. President Clinton cited the Chief Justice's warning in his August 12, 1999, speech to the American Bar Association, when there were only 63 vacancies. He often cited the Chief Justice during his weekly radio addresses. See *Congressional Record*, October 22, 1997, at S10924.
[15] See *supra* note 6.
[16] http://leahy.senate.gov/press/199801/980101.html.
[17] *Id.*

[18] *Congressional Record*, October 21, 1998.
[19] R. Neas, "Written Testimony of Ralph G. Neas," House Judiciary Subcommittee on the Constitution (October 10, 2002), at 1 (hereinafter *Neas Testimony*).
[20] See Rutkus, "Judicial Nominations by President Clinton During the 103rd-106th Congresses," *CRS Report for Congress* (February 21, 2001).
[21] CRS does not count judicial nominations made within four months of adjournment of a two-year Congress because of the time required for FBI background checks, Judiciary Committee evaluation, hearings, and the like. See Garcia, "Failed Nominations on Which No Hearings Were Held, 1987-1996," *Congressional Research Service Memorandum* (September 5, 1997), at 1. Since President Bush no longer provides the American Bar Association with names of prospective nominees prior to nomination, however, the ABA conducts its evaluations after nomination, lengthening this time.
[22] *Neas Testimony*, at 1.
[23] Rutkus, *supra* note 20, at summary page.
[24] *Neas Testimony*, at 2.
[25] U.S. Constitution, Article II, Section 2.
[26] Speech before the American Society of Newspaper Editors, April 19, 1996.
[27] Meese, "Foreword," in *Judicial Selection: Merit, Ideology, and Politics* (National Legal Center for the Public Interest, 1990), at x. This appeared to be true for some appointees of President Harry Truman. Judge David Bazelon served on the U.S. Court of Appeals for the D.C. Circuit from 1949 to 1993. Judge David Edelstein served on the U.S. District Court for the Southern District of New York from 1951 to 2000. He was in active service for 43 of those 49 years. And Judge Seybourn Lynn served on the U.S. District Court for the Northern District of Alabama from 1945 to 2000, nearly half of those 55 years as a senior judge.
[28] U.S. Constitution, Article III, Section 1.
[29] Federal judges are subject to the same standard for impeachment as all other "civil Officers of the United States," namely, "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Constitution, Article II, Section 4.
[30] Hamilton, *The Federalist* No.78, available at http://memory.loc.gov/const/fed/fed_78.html.
[31] Hamilton, *The Federalist* No.73, available at http://memory.loc.gov/const/fed/fed_73.html.
[32] Hamilton, *supra* note 30.
[33] *Black's Law Dictionary* (5th ed. 1979), at 734.
[34] Hamilton, *supra* note 30.
[35] *Id.*
[36] *Id.*, quoting Montesquieu, *The Spirit of Laws* (Nugent trans., Rothman 1991), at 152.
[37] *Gregory v. Ashcroft*, 501 U.S. 452,458 (1991), quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234,242 (1985).
[38] See, e.g., Alabama Const., Section 43 ("the judicial [department] shall never exercise the legislative and executive powers, or either of them"); Arizona Const., Article III; Arkansas Const., Article 4, Section 2; California Const., Article 3, Section 3; Colorado Const., Article III; Connecticut Const., Article XVIII; Florida Const., Article II, Section 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches"); Idaho Const., Article II, Section 1; Illinois Const., Article II, Section 1 ("No branch shall exercise powers properly belonging to another"); Indiana Const., Article 3, Section 1; Iowa Const., Article III, Section 1; Kentucky Const., Section 28; Louisiana Const., Article II, Section 2; Maine Const., Article III, Section 2; Maryland Const., Article 8; Massachusetts Const., Part the First, Article XXX; Michigan Const., Article III, Section 2; Minnesota Const., Article III, Section 1; Missouri Const., Article II, Section 1; Montana Const., Article III, Section 1; Nebraska Const., Article II, Section 1; Nevada Const., Article III, Section 1; New Jersey Const., Article III, Section 1 ("No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others"); North Carolina Const., Article I, Section 6; Oklahoma Const., Article IV, Section 1; Oregon Const., Article III, Section 1; Rhode Island Const., Article V; South Carolina Const., Article I, Section 8; South Dakota Const., Article II; Tennessee Const., Article II, Section 2; Texas Const., Article 2, Section 1; Utah Const., Article V, Section 1; Vermont Const., Chapter II, Section 5; Virginia Const., Article 1, Section 5; West Virginia Const., Article V, Section 1; Wyoming Const., Article II, Section 1.
[39] Arizona Constitution, Article III.
[40] Alabama Const., Article III, Section 42. See also Massachusetts Const., Part the First, Article XXX.
[41] Meese, *supra* note 27. See also McDowell, "Doubting Thomas," *The New Republic*, July 29, 1991, at 12 (it is "an argument over … the nature and extent of judicial power under a written Constitution").

[42] Making his first judicial nominations on May 9, 2001, President Bush said: "Every judge I appoint will be a person who clearly understand the role of a judge is to interpret the law, not to legislate from the bench." http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html.

[43] http://www.judicialselection.org/.

[44] http://www.usdoj.gov/olp/nominations.htm.

[45] *Gaziano Testimony*, at 11.

[46] See *id.* at 12.

[47] *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002).

[48] *Gaziano Testimony*, at 14.

[49] See *id.* The case is *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

[50] *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001).

[51] These include Barrington Parker (nominated 5/9/01, confirmed 10/11/01) and Reena Raggi (nominated 5/1/02, confirmed 9/20/02) to the Second Circuit, Roger Gregory (nominated 5/9/01, confirmed 7/20/01) to the Fourth Circuit, Edith Clement (nominated 5/9/01, confirmed 11/13/01) to the Fifth Circuit, William Riley (nominated 5/23/01, confirmed 8/2/01) to the Eighth Circuit, Harris Hartz (nominated 6/21/02, confirmed 12/6/01) to the Tenth Circuit, and Sharon Prost (nominated 5/21/01, confirmed 9/21/01) to the Federal Circuit.

[52] *Gaziano Testimony*, at 14. In another example, the Sixth Circuit voted 2-1 that a Kentucky resolution allowing display of historic documents including the Ten Commandments is an unconstitutional "establishment of religion." In *Adland v. Russ*, 2002 U.S.App. LEXIS 21054 (10/9/02), the same Carter appointee, Chief Judge Boyce Martin, wrote the opinion, joined by a Clinton-appointed visiting judge who was participating only because the Sixth Circuit was so under-staffed.

[53] See Professor Tribe's testimony at http://judiciary.senate.gov/oldsite/te062601tri.htm.

[54] J. Eastman, "The Limited Nature of the Senate's Advice and Consent Role: Prepared Testimony of Dr. John Eastman," House Judiciary Subcommittee on the Constitution (October 10, 2002).

[55] A. Hamilton, *The Federalist* No.65, available at http://memory.loc.gov/const/fed/fed_65.html.

[56] *Neas Testimony*, at 2. He is not alone among leftists pushing this unconstitutional view. On June 26, 2001, Sen. Charles Schumer (D-New York) chaired a hearing in his Judiciary Subcommittee on Administrative Oversight and the Court titled "Should Ideology Matter? Judicial Nominations 2001." Marcia Greenberger, Co-President of the National Women's Law Center, testified that the Senate has a "co-equal, independent role" in judicial selection. See http://www.nwlc.org/pdf/nominationstestimony.pdf, testimony at 6. Her argument that the president having "a superior role in judicial appointments … would upset the … [Constitution's] system of checks and balances," *id.* at 7, is impossible to reconcile with the view of America's founders (the ones who created that system of checks and balances) that "in the business of appointments the executive will be the principal agent." *See supra* note 55.

[57] A. Hamilton, *The Federalist* No.76, available at http://memory.loc.gov/const/fed/fed_76.html.

[58] See Rutkus, "Senate Judiciary Committee Votes on Judicial Nominations Other than Those Approving Motions to Report Favorably, 1943 to the Present," *Congressional Research Service Memorandum* (March 5, 2002), at 3-4. The others were Charles Pickering, defeated on March 14, 2002; Kenneth Ryskamp, defeated on April 11, 1991; Bernard Siegan, defeated on July 14, 1988; Jefferson Sessions, defeated on June 5, 1986; and Charles Winberry, defeated on March 4, 1980. See *id.*

[59] The Judiciary Committee approved Judge Clement's nomination on November 1, 2001, with the full Senate approving the nomination on November 13, 2001, by a 99-0 vote. See http://www.senate.gov/legislative/vote1071/vote_00335.html.

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